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Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE LAVAY CORPORATION; GERARD M. LAVAY,
Petitioner,

v.

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION
and WILLIAM J. DORN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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87 PP

QUESTIONS PRESENTED

I.

WILL THIS COURT CERTIFY THIS CASE TO THE VIRGINIA SUPREME COURT FOR ITS INTERPRETATION OF THE PROPER VIRGINIA STATUTE OF LIMITATIONS WHEN THE FOURTH CIRCUIT COURT OF APPEALS APPLIED THE WRONG STATUTE OF LIMITATIONS TO THE FACTS IN THIS CASE?

II.

WILL THIS COURT GRANT CERTIORARI TO CORRECT THE ERROR OF THE FOURTH CIRCUIT COURT OF APPEALS IN ITS APPLICATION OF THE VIRGINIA STATUTE OF LIMITATIONS IN THIS CASE?

III.

WAS RICO SUFFICIENTLY PLED IN THIS CASE AND IF SO, DID THE FOURTH CIRCUIT COURT OF APPEALS ERR IN NOT APPLYING *AGENCY HOLDING CORP. v. MALLEY-DUFF & ASSOCIATES, INC.*, 483 U.S. ___, 97 L Ed.2d 121, 107 S.Ct. ___ (6/22/87) TO THE FACTS IN THIS CASE IN REACHING THE QUESTION APPEALED BY PETITIONERS THAT RICO WAS SUFFICIENTLY PLED?

IV.

MUST A DISTRICT TRIAL JUDGE WHO HEARS ALL THE FACTS AT TRIAL ALWAYS HOLD A SEPARATE EVIDENTIARY HEARING FOLLOWING TRIAL WHEN A FED. R. Civ. Pr. 11 MOTION

IS FILED FOR SANCTIONS BY COUNSEL FOR A DEFENDANT WHO OBTAINS A DIRECTED VERDICT AT THE END OF PLAINTIFF'S CASE?

V.

WHERE PETITIONERS FILED SUIT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND BASED ON DIVERSITY, AND THAT CASE WAS TRANSFERRED BY STIPULATION TO THE EASTERN DISTRICT OF VIRGINIA IN PART FOR THE CONVENIENCE OF THE PARTIES, SHOULD MARYLAND'S THREE (3) YEARS STATUTE OF LIMITATIONS AND LAW ON LOST PROFITS HAVE BEEN APPLIED TO THE FACTS IN THAT CASE?

VI.

WILL THIS COURT GRANT CERTIORARI TO CORRECT THE ERROR OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WHEN THAT COURT ERRONEOUSLY HELD THAT PETITIONERS HAD NOT APPEALED THE GRANTING OF JUDGMENT N.O.V. ON PETITITIONER'S CLAIM OF CONSTRUCTIVE FRAUD WHEN, IN FACT, PETITIONER HAD SO APPEALED IT, BRIEFED IT AND DOMINION FEDERAL HAD BRIEFED IT?

VII.

IS *DONOVAN V. PENN SHIPPING CO., INC.*, 429 U.S. 648, 51 L.Ed.2d. 112, 97 S.Ct. 835 (1977) A BAR TO PETITIONER'S APPEAL OF THE PROPRIETY OF THE REMITTITUR GRANTED IN THIS CASE?

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Pursuant to Supreme Court Rule 21.1 (b) original parties to this action who are not parties in this Petition for Certiorari are:

WILLIAM J. WALDE
DAVID A. NEAL
JAMES WINSTON BRAY

The list of all parties to the proceeding in this Court whose judgment is sought to be reviewed is as follows:

THE LaVAY CORPORATION (Petitioner)
GERARD M. LaVAY (Petitioner)
DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION (Respondent)
WILLIAM J. DORN (Respondent)

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DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION
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PETITION FOR WRIT OF CERTIORARI
TO THE JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

Petitioners, The LaVay Corporation and Gerard M. LaVay, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 2, 1987, petition for rehearing denied November 6, 1987 in the case styled *The LaVay Corporation; Gerard M. LaVay vs. Dominion Federal Savings & Loan Association; William J. Dorn,* No. 86-1699, No. 86-1703, No. 86-1705 which reversed a $250,000.00 jury verdict in favor of Petitioner The LaVay Corporation and required that a hearing on sanctions be held under

Fed. R. Civ. Pr. 11 with respect to that portion of the case involving William J. Dorn.

OPINIONS

The decision of the United States Court of Appeals for the Fourth Circuit dated October 2, 1987 is included herein as Appendix A. The denial of the Petition for Rehearing dated November 6, 1987 is included herein as Appendix B. The September 25, 1986 Opinion of District Judge James C. Cacheris is appended as Appendix C.

JURISDICTION

The jurisdiction of this Honorable Court to issue a Writ of Certiorari is based upon 28 U.S.C. §1254.

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. §1254
28 U.S.C. §1332
28 U.S.C. §1404(a)
28 U.S.C. §1406(a)
Virginia Code §8.01-243
Virginia Code §8.01-246(3)
Virginia Code §8.01-248
Virginia Code §8.01-249

RULES

Federal Rules of Civil Procedure Rule 11
Virginia Supreme Court Rule 5:42

STATEMENT OF FACTS

In March, 1983 Petitioners approached Defendant, Dominion Federal Savings and Loan Association ("Dominion") to obtain an acquisition, construction

and development loan in the amount of $11,250,000.00 to construct a retirement community in St. Lucie County, Florida.

Dominion reviewed the loan proposal and offered to become partners with The LaVay Corporation, but for regulatory purposes, to structure the transaction as a loan, when in fact it was a partnership. The partnership, as found to exist by the jury, had its inception in August, 1983. Petitioners on the representation of Dominion that the purchase money would be available, provided voluminous environmental documentation and other materials in order that the transaction could close at the end of September, 1983. Petitioners extended their purchase contract based on Dominion's continued representations that it would perform under the oral partnership. On September 26, 1983, Dominion informed Petitioners that it would not perform. William Dorn, the attorney assigned by Dominion to do all the documents in connection with the transaction informed the Petitioners on September 26, 1983 that Dominion had told him that the transaction was over with Petitioners, but to keep working on the documents.

The Petitioners discovered in approximately April, 1984 that a loan on the project in Florida had been made by Ben Franklin Savings and Loan Association, located in Oak Brook, Illinois. The St. Lucie County, Florida land records indicated Dorn had executed financing statements as agent for Ben Franklin Savings and Loan Association.

The Petitioners investigated further beginning in March, 1984. By the first part of October, 1984, Petitioners had discovered that the stock owned by Waterwood Homes, Inc. (the original seller to

Petitioner The LaVay Corporation) had been acquired by a subsidiary corporation of Ben Franklin Savings and Loan Association; that the 100% stockholder of Ben Franklin was a close personal friend and partner of William Walde, the controlling stockholder and Chairman of the Board of Dominion.

On September 13, 1985, Petitioners filed suit alleging breach of contract, fraud, constructive fraud, breach of fiduciary duty, RICO and interference with contractual duties. Subsequent discovery during the pendency of the case confirmed the fraudulent scheme. The jury returned a verdict for Petitioner The LaVay Corporation for $80,000.00 compensatory damages on the constructive fraud count and $1,000.00 in compensatory damages and $750,000.00 in punitive damages on the breach of fiduciary duty count. The trial judge granted the Motion for Judgment N.O.V. and disallowed the $80,000.00 awarded for the constructive fraud, holding that Virginia's one (1) year statute of limitations barred that award; he remitted the $750,000.00 punitive damage award to $250,000.00, and held Virginia's five (5) year statute of limitations applied to this award and allowed it to the extent of $250,000.00.

William Dorn, who was named as a defendant in the breach of fiduciary duty, interference with contract and RICO counts was directed out of the case at the end of the Petitioner's case. A post trial motion by Dorn for Rule 11 sanctions was denied by the trial judge.

On appeal, the Fourth Circuit on October 2, 1987 applied Virginia's one (1) year statute of limitations, thereby eliminating Petitioner, The LaVay Corporation's damages (except as to $1,000.00) and remanded

to the trial court for an evidentiary hearing on the Rule 11 motion.

From that decision, Petitioners file this Petition for Certiorari.

ARGUMENT

I. THE SUPREME COURT OF THE UNITED STATES SHOULD CERTIFY THE VIRGINIA STATUTE OF LIMITATIONS QUESTIONS TO THE VIRGINIA SUPREME COURT BECAUSE VIRGINIA LAW IS DETERMINATIVE AND THERE IS NO CONTROLLING PRECEDENT ON POINT IN THE DECISIONS OF THE VIRGINIA SUPREME COURT OR THE COURT OF APPEALS OF VIRGINIA

Effective April 1, 1987, the Virginia Supreme Court adopted Rule 5:42. Such rule is appended as Appendix D. Pursuant to that rule, the Supreme Court of the United States may certify a question of Virginia law that is determinative in any proceeding pending before the certifying court to the Virginia Supreme Court where there is no controlling precedent on point in the decisions of the Virginia Supreme Court or the Court of Appeals of Virginia.

Until the decision of the United States Court of Appeals for the Fourth Circuit rendered October 2, 1987, Petitioners had no reason to seek certification to the Virginia Supreme Court of the issues of the application of the Virginia Statutes of Limitations to the torts of constructive fraud and breach of fiduciary duty found to exist by the jury in this case. District Judge James C. Cacheris applied a five year statute to the breach of fiduciary duty, finding no controlling Virginia precedent. He applied a one year statute to constructive fraud, which Petitioner duly appealed

contrary to the footnote 1 of the October 2, 1987 Opinion of the United States Court of Appeals for the Fourth Circuit. Petitioner represents there is no controlling precedent in Virginia analogous to the facts present in this case and that certification of the question to Virginia's highest court is appropriate to resolve the Virginia Statute of Limitations questions in this matter.

II. IN THE ALTERNATIVE, THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT CERTIORARI TO CORRECT THE ERRONEOUS APPLICATION OF THE VIRGINIA STATUTE OF LIMITATIONS IN THIS CASE.

Most recently the Virginia Supreme Court in *Hicks v. Roadside Nurseries, Inc.*, No. 841018, No. 841005 decided November 25, 1987 (Opinion by Justice Charles S. Russell) which involved the applicable Virginia Statute of Limitations *in actions between partners*, held that Virginia five year statute prescribed by Virginia Code §8.01-246(3) which governs actions between partners, rather than the three year statute of limitations governing actions on contracts applied, stating

> "Like partners, joint venturers have a fiduciary relationship among themselves which begins with the opening of the negotiations for formation of the syndicate, applied to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated."

The jury found a breach of fiduciary duty by Dominion Federal Savings & Loan Association and assessed $1,000.00 in compensatory damages and $750,000.00 in punitive damages (reduced by remittur

to $250,000.00) for breach of fiduciary duty. The tort of breach of fiduciary duty clearly had its basis in the partnership which the jury found to exist. Judge Cacheris allowed the award. See Appendix C.

The Virginia Statute of Limitations is appended as Appendix E.

What was said by the Supreme Court of the United States in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. ___, 97 L.Ed.2d 121, 107 S.Ct. ___, (June 22, 1987) with respect to the RICO statute of limitations has application to the confusion presently existing with regard to the applicable Virginia statute of limitations as applied in this case to bar The LaVay Corporation's damage awards. The Virginia statute of limitations is "confused, inconsistent and unpredictable." "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute." This is particularly true in this case because *Pigott v. Moran,* 231 Va. 76, 341 S.E.2d. 179 (1986) had not been decided when this case was filed.

The confusion inherent in Virginia's statute of limitations is evident by reference to *Reid v. Madison,* 455 F.Supp. 1066, 1068 (E.D. Va 1978) and *Proctor v. Paine,* 288 F.Supp. 836, 844 (E.D. Va 1968) where it was held that common law fraud or RICO fraud are actions for injury to property and thus entitled to the five year limitation period. *Bush Development Corp. v. Harbour Place Associates,* 632 F.Supp. 1359 (E.D. Va 1986).

The Virginia Supreme Court issued its decision in *Pigott v. Moran,* 231 Va. 76, 341 S.E.2d. 179 (1986)

while the instant case was pending, which case concerns the applicable statute of limitations in an action for damages based on common law fraud. This case holds that the one year statute (i.e., Section 8.01-248) governs an action for fraud. 231 Va. at ___, 341 S.E.2d. at 181. It is particularly significant that this case did not concern a partnership context.

Section 8.01-248 of the Virginia Code provides:

> "Personal actions for which no other limitation is specified. Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued."

No Virginia Court has answered the question which statute of limitation applies where constructive fraud is alleged to have arisen in a partnership and one partner sues the other partner on the basis of constructive fraud. The LaVay Corporation asserts Section 8.01-246(3) (actions against partners) or Section 8.01-243 (action for injury to property) should apply to such a constructive fraud count, since each of these provide for specific limitations for these categories.

With respect to the constructive fraud count, The LaVay Corporation also asserts Section 8.01-249 has not been properly applied to the diligence it exercised in this case in discovering constructive fraud that was concealed from it, which statute provides in pertinent part:

> "Section 8.01-249. When cause of action shall be deemed to accrue in certain personal actions. The cause of actions herein listed shall be deemed to accrue as follows:

> 1. In actions for fraud . . . when such fraud is discovered or by the exercise of due diligence reasonably should have been discovered."

The issue of when the constructive fraud should have been discovered was never submitted to the jury. The record of the case indicates it was not discovered until October, 1984, The LaVay Corporation suggests the disallowance of the constructive fraud damages was an error.

Section 8.01-243 of the Virginia Code, captioned "Personal Actions Generally," provides:

> "Personal action for injury to person or property generally.
>
> A. Unless otherwise provided by statute, *every action for personal injuries whatever the theory of recovery,* except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued. (Emphasis supplied).
>
> B. *Every action for injury to property,* including actions by a parent or guardian of an infant against a tort feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years next after the cause of action shall have accrued."

The LaVay Corporation also asserts that Section 8.01-243(B) governs its claim grounded on the tort of

breach of fiduciary duty for which punitive damages were awarded and supersedes the catch-all provisions of Section 8.01-248. No Virginia case has addressed the applicable statute of limitations for the tort of breach of fiduciary duty, which tort certainly falls within the ambit of Section 8.01-243, i.e., *every* action for *injury to property.* (Emphasis supplied). The LaVay Corporation lost its contractual right to buy the Florida property, which was an injury to its property.

Under this statute, The LaVay Corporation's claim for breach of fiduciary duty is timely under the statute of limitations and application of the proper statute of limitations should be specifically addressed by this Court.

The LaVay Corporation also asserts the lower court was also right in holding that its claim for breach of fiduciary duty was timely filed on the basis of Section 8.01-246(3) or (4) personal actions based on partnership actions or oral contracts which in pertinent part provides:

> "*Subject to the provisions of Section 8.01-243* regarding to injuries to person and property . . . actions founded upon a contract . . . shall be brought within the following number of years next after the course of action shall have accrued:
>
> 3. In actions by a partner against another for settlement of the partnership account . . . within five years.
>
> or
>
> 4. In actions upon any unwritten contract,

express or implied, within three years. (Emphasis supplied)."

III. THE APPLICABLE STATUTE OF LIMITATIONS TO A RICO CLAIM IS FOUR YEARS, IS NOT CONTROLLED BY STATE STATUTES OF LIMITATIONS FOR FRAUD, AND IN THIS INSTANCE AS SHOWN BY THE PROFFER, THE RICO CLAIM WAS PROPERLY PLED.

During the pending of this case before the Fourth Circuit, *Agency Holding Corporation v. Malley-Duff Associates, Inc.*, 483 U.S. ___, 97 L Ed. 2nd 121, 107 S. Ct. ___, (Decided June 22, 1987) held all RICO civil enforcement actions have a four (4) year statute of limitations regardless of any State statute of limitations.

The injustice of the Fourth Circuit decision demands correction. The Petitioner had asked the Fourth Circuit to review the sufficiency of the pattern of racketeering it had pled which count had been dismissed prior to trial. Petitioner proffered the facts at trial it would have presented had it been allowed to proceed under its RICO count, appended hereto as APPENDIX F. The Amended Complaint is attached as APPENDIX G. This pretrial ruling weakened Petitioner's claims of fraud before the jury, nevertheless the jury did find constructive fraud, the equivalent in Virginia to negligent misrepresentation. The trial court granted a Motion N.O.V. and dismissed the constructive fraud count on the erroneous premise that the Virginia Statute of Limitations had run since suit was not filed within one year of what it considered to be the time such constructive fraud should have been discovered. Incredibly, the Fourth Circuit even overlooked the fact that Petitioner appealed the

trial court's ruling in this regard. Footnote 1 of the Fourth Circuit's Opinion states "LaVay does not challege this order in this appeal." Nothing could be further from the truth. Reference to the brief of Petitioner and Dominion Federal will disclose extensive briefing on this issue.

The Fourth Circuit declined to reach the question of whether the RICO count was properly pled because it found that the fraud claim was dismissed against Dorn and the jury verdict against Dominion did not find actual fraud. This ignores the fact that Petitioner never even got the chance to present its RICO evidence to the trier of fact, which facts Petitioner had proffered would conclusively show fraud as a predicate for its RICO claim. The Fourth Circuit totally ignores the proffer. As such, its decision does not begin to address the issue before it.

Suit on the RICO count was properly brought by Petitioner within the four year statute dictated by *Agency Holding Corp. v. Malley-Duff & Associates, Inc. supra* which is not dependent on the Virginia statute of limitations on fraud. The Fourth Circuit erred when it did not consider what was pled in the amended complaint or the proffer of facts supporting the Petitioner's RICO claims.

IV. A TRIAL JUDGE IS NOT REQUIRED TO HOLD A SEPARATE EVIDENTIARY HEARING WHEN HE DENIES FED. R. Civ. Pr. 11 SANCTIONS BASED UPON THE FACTS PRODUCED AT TRIAL.

In this case, District Judge James C. Cacheris denied William J. Dorn's motion for sanctions brought pursuant to Federal Rule Civil Procedure 11. His ruling was based on the facts he heard at trial, finding

that the action against Dorn was not frivolous. The Fourth Circuit reversed holding that the decision was premature because plaintiffs "have yet to state any inquiry or facts which justified their filing a claim against Dorn."

The practical import of this ruling, should it stand, is to require a separate evidentiary hearing in each instance where a Rule 11 motion is filed and remove from the trial judge the ability to exercise judicial discretion in deciding such motion, where appropriate, on the basis of his knowledge gained from the pretrial hearings, pleadings, and evidence at trial.

A Rule 11 hearing will become an additional substantial cost for plaintiffs and counsel for plaintiffs whenever a directed verdict is rendered and will have a chilling effect on any litigation.

This Fourth Circuit decision ignores the Notes of Advisory Committee on Rule which provides:

> "... In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.
>
> To assure that the efficiencies achieved through more effective operation of the pleading regime will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible, limit the scope of sanction proceedings to the record ..."

Judge Cacheris sought to do this. The record was and is clear that Dorn violated fiduciary duties as the lawyer for a partnership in which the petitioner, The

LaVay Corporation, was a partner. Dorn participated in the breach of fiduciary duty committed by Dominion Federal, in part as agent for Dominion Federal, when, Dominion Federal engaged in depriving the LaVay Corporation of its real estate project in Port St. Lucie, Florida.

Justice has been denied to The LaVay Corporation and to its counsel by this portion of the Fourth Circuit ruling. The Supreme Court should make it unmistakenly clear for future litigants what discretion the trial judge has in deciding a Rule 11 motion.

V. THE MARYLAND THREE (3) YEAR STATUTE OF LIMITATIONS CONTROLS THIS ACTION AND UPON TRANSFER OF THE CASE TO THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF VIRGINIA THAT COURT WAS BOUND TO APPLY NOT ONLY THE MARYLAND STATUTE OF LIMITATIONS BUT ALSO MARYLAND LAW AS TO LOST PROFITS.

Maryland's three (3) year statute of limitations applies with respect to the Statute of Limitations issue in this case.

The action was originally filed in the United States District Court for the District of Maryland on the basis of diversity pursuant to 28 U.S.C. §1332.

Dominion Federal sought a transfer to the Eastern District of Virginia pursuant to 28 U.S.C. §1404(a), 1406(a) on the grounds asserted in it motion that "such a transfer would be for the convenience of the parties and witnesses and in the interest of justice and judicial economy." It admitted as to it, venue was proper because it does business in Maryland. The LaVay Corporation was a Maryland corporation. The

order as drafted by Dominion Federal's counsel did not state whether the transfer was for convenience or not.

In *Van Dusen v. Barrack,* 376 U.S. (1964), the Supreme Court of the United States held:

> "In cases such as the present, where the defendants seek transfer, the transferee district must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms."

One defendant cannot object because venue is improper as to other defendants. *Camp v. Gress,* 250 U.S. 308 (1919).

The Fourth Circuit in *Linnell v. Sloan,* 636 F.2d 65 (1980) held that choice of law rules require application of the law of the original forum where venue of a civil action is transferred pursuant to 28 U.S.C. §1404(a). The Sixth Circuit in *Martin v. Stokes,* 623 F.2d 469 (1980) held that where the record is unclear whether the transfer is under 28 U.S.C.A. §§1404(a) or 1406(a), remand is necessary to make the finding what the actual basis of the transfer was.

The Supreme Court has never addressed the issue of forum shopping with respect to limitations. Forum shopping was condoned in *Allstate Insurance Co. v. Hague,* 449 U.S. 302 66 L.Ed.2d 521, 101 S.Ct. 633 (1981) where the case involved stacking of uninsured motorist coverage, not statute of limitations. Forum shopping has been allowed in the Fourth and Eleventh Circuits with respect to statutes of limitation. *Goad*

v. Celotex Corp., No. 86-3540, Fourth Circuit (October 16, 1987) *McVicar v. Standard Insulations, Inc.*, 824 F2d 920, Eleventh Circuit (August 19, 1987).

In the context of Petitioners' case, the guidance of the Supreme Court would be particularly helpful to other litigants as to what choice of law rules are to be followed and what forum shopping is permissible.

For the reasons stated above, Maryland's law as to lost profits should also be applied to the facts in this case.

VI. WILL THIS COURT GRANT CERTIORARI TO CORRECT THE ERROR OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WHEN IT ERRONEOUSLY HELD THAT PETITIONERS HAD NOT APPEALED THE GRANTING OF JUDGMENT N.O.V. ON PETITIONER'S CLAIM OF CONSTRUCTIVE FRAUD WHEN IN FACT PETITIONER HAD SO APPEALED IT, BRIEFED IT AND DOMINION FEDERAL HAD BRIEFED IT?

Petitioner appealed the trail court's N.O.V. ruling that the constructive fraud jury award of $80,000.00 was barred by the Virginia one year statute of limitations. The Fourth Circuit opinion at footnote 1 states: "LaVay does not challege this order in this appeal." The Fourth Circuit opinion is wrong. Reference to Petitioners' appeal brief and the brief of Dominion Federal clearly demonstrates that such issue was appealed by Petitioner.

There is no recourse but to this Honorable Court to correct this blatant error.

VII. THE PETITIONERS SHOULD BE ENTITLED IN THIS CASE TO RELITIGATE THE REMITTITUR

In *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 51 L.Ed.2d 112, 97 S.Ct. 835 (1977), the Supreme Court held that a plaintiff could not appeal a remittitur order he has accepted.

The trial judge in this case based his decision to remit the jury award of punitive damages of $750,000.00 to $250,000.00 on the fact that he granted a Judgment N.O.V. in favor of Dominion Federal as to the $80,000.00 jury award of compensatory damages for constructive fraud, and which left only $1,000.00 in compensatory damages. He found the ratio of 250:1 to be reasonable and the ratio of 750:1 to be unreasonable for the ratio of compensatory damages to punitive damages.

The trial judge granted the Judgment N.O.V. with respect to constructive fraud on his application of the Virginia Statute of Limitations. Petitioners appealed this which was never reached by the Fourth Circuit which erroneously held the Petitioners had not appealed the granting of the Judgment N.O.V.

Under these exceptional circumstances, *Donovan v. Penn Shipping Co., Inc., supra* should not be a bar to Petitioner's appeal of the propriety of the remittitur.

CONCLUSION

For the foregoing reasons, Petitioners, The LaVay Corporation and Gerard M. LaVay, pray that this court issue its Writ of Certiorari or alternatively to grant such other relief as is appropriate in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-1699(L)

THE LAVAY CORPORATION; GERARD M. LAVAY
Plaintiffs-Appellees,

versus

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION
Defendant-Appellant,

and

WILLIAM L. WALDE; DAVID A. NEAL; JAMES WINSTON BRAY; WILLIAM J. DORN
Defendants.

N. 86-1703

THE LAVAY CORPORATION; GERARD M. LAVAY
Plaintiffs-Appellants,

versus

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION
Defendant-Appellee,

and

WILLIAM L. WALDE; DAVID A. NEAL; JAMES WINSTON BRAY; WILLIAN J. DORN
Defendants.

No. 86-1705

THE LAVAY CORPORATION; GERARD M. LAVAY
Plaintiffs-Appellees,

versus

WILLIAM J. DORN
Defendant-Appellant,

and

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION; WILLIAM L. WALDE; DAVID A. NEAL; JAMES WINSTON BRAY
Defendants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (CA-86-13-A)

Argued: May 7, 1987 **Decided:** October 2, 1987

Before WINTER, Chief Judge, HARVEY, Chief Judge, United States District Court for the District of Maryland, and SMALKIN, United States District Judge for the District of Maryland, sitting by designation.

Philip Jon Harvey (Shaw, Pittman, Potts & Trowbridge on brief); Waldemar J. Pflepsen, Jr. (Aaron L. Handleman; Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey on brief) for Appellants; Carlton M. Green (Richard C. Daniels; Green, Loboudger & Daniels on brief) for Appellees.

WINTER, Chief Judge:

Plaintiffs, The LaVay Corporation (LaVay) and Gerard LaVay, instituted this action in Maryland against defendants Dominion Federal Savings and Loan Association (Dominion), several officers of Dominion, and Domin-

ion's attorney, William Dorn, alleging fraud, breach of contract, breach of fiduciary duty, interference with contract, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), stemming from the decision of Dominion to deny plaintiffs' request for a loan to finance acquisition and development of some Florida real estate. The Maryland district court, upon stipulation of the parties, transferred the case to the Eastern Virginia district court. Prior to trial, the Eastern Virginia district court dismissed plaintiffs' RICO claim. At trial, following the presentation of the plaintiffs' case, the district court directed a verdict for the individual defendants on all of plaintiffs's claims against the individual defendants. At the conclusion of the trial, the jury returned a verdict in favor of LaVay against Dominion on LaVay's claim of breach of fiduciary duty and awarded LaVay $1000 in compensatory damages and $750,000 in punitive damages. The jury also returned a verdict for LaVay on the claim of constructive fraud and awarded LaVay $80,000 in compensatory damages. The jury returned a verdict for defendant Dominion on all remaining claims, including the claims of plaintiff Gerard LaVay.

Following the filing of post-judgment motions, the district court granted Dominion's motion for judgment notwithstanding the verdict on LaVay's claim of constructive fraud on the ground that this claim was barred by the relevant statute of limitations.[1] The district court also ordered, and LaVay accepted, a remittitur of the damage award on the breach of fiduciary duty claim to $250,000. Finally, the district court denied motions by defendant Dorn for Rule 11 sanctions and for an award of costs due to expert witness and deposition transcript fees.

Defendant Dominion appeals the award of punitive damages based on LaVay's claim of a breach of fiduciary duty. Defendant Dorn appeals the denial of his motion for sanc-

[1] LaVay does not challenge this order in this appeal.

tions under Rule 11 and the denial of costs for expert witness and deposition transcript fees. LaVay cross-appeals the district court's dismissal of its RICO claim, the district court's remittitur of the damage award, and the district court's ruling excluding evidence of lost profits from trial. We affirm the district court's orders that are challenged in LaVay's cross-appeal. With regard to defendant Dorn's appeal, we affirm the denial of expert witness fees but otherwise vacate the judgment of the district court and remand for further proceedings. With regard to the punitive damage award challenged in Dominion's appeal, we reverse.[2]

I.

Gerard LaVay and LaVay (the corporation), both experienced commercial developers, decided to acquire 883 acres of property in Florida from Waterwood Homes Corporation to develop a mobile home retirement complex named the Savannah Club. In March 1983, LaVay entered into an option contract for the purchase of the Savannah Club property from Waterwood Homes. LaVay agreed to purchase the property by June 1, 1983, or within thirty days after Waterwood Homes obtained the final permits for development of the Club and deposited $50,000 to secure its option.

To finance the purchase and development of the Savannah Club, LaVay sought a loan of apoproximately thirteen million dollars from Dominion Federal Savings & Loan Association. During negotiations over the proposed loan, LaVay paid Dominion a $15,000 to appraise the proposed project. LaVay and Dominion negotiated over the proposed financing for some time, but abandoned the negotiations in September, 1983. As a result, LaVay was unable to purchase and develop the Florida property that it desired.

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[2] The $1,000 ward of compensatory damages is not challenged in this appeal.

During the negotiations, attorney William Dorn represented Dominion.

Following cessation of the negotiations between Lavay and Dominion Federal, Waterwood Homes developed the land into a mobile home retirement complex after obtaining approximately six million dollars in financing from Ben Franklin Savings & Loan. Attorney William Dorn represented Ben Franklin Savings & Loan in this transaction.

LaVay and Dominion offer different reasons for the failure of their negotiations. Dominion contends that it withdrew from the project before any agreement was reached when it received a report that the project was worth only $10,900,000.00 which was insufficient value to support the proposed thirteen million dollar loan. LaVay contends that Dominion withdrew from financing the Savannah Club, following the formation of an oral agreement between the parties, in order to pocket the $15,000 for the letter of commitment and the $5,000 appraisal fee. LaVay also contends that Dominion withdrew from financing the Savannah Club in order to benefit Ben Franklin Savings & Loan, the firm that ultimately financed development of the Savannah Club by Waterwood Homes.

Plaintiffs instituted this action against defendants because of their denial of the loan to LaVay. Following transfer of the case and a series of motions and hearings, the Eastern Virginia district court dismissed plaintiffs' RICO claim. Prior to trial of the remaining claims, the district court excluded from trial evidence of lost profits by plaintiffs.

A trial was held, and at the end of the presentation of plaintiffs' case, the district court granted directed verdicts on all counts in favor of all defendants except Dominion, thereby dismissing Dominion's directors and attorney from the case. After the conclusion of the trial, the jury returned a verdict in favor of LaVay on its claim of breach of fiduciary duty, awarding $1,000 in compensatory dam-

ages and $750,000 in punitive damages, and on its claim of constructive fraud, $80,000 in compensatory damages. The jury returned a verdict for defendant Dominion on all claims alleged by plaintiff Gerard LaVay and against LaVay on the remaining claims of actual fraud, breach of contract, and interference with contractual relations.

After post-judgment motions were filed, the district court granted Dominion's motion for judgment n.o.v. on LaVay's claim of constructive fraud because this claim was barred by the relevant statute of limitations. The district court also ordered a remittitur of the punitive damage award on the breach of fiduciary duty claim to $250,000 which plaintiff LaVay accepted rather than undergo a new trial. The district court also denied motions by defendant Dorn for Rule 11 sanctions, and for costs due to expert witness and deposition transcript fees. Defendants Dominion and Dorn appeal from these judgments, and Gerard LaVay cross-appeals on several other grounds.

II.

A threshold issue in resolving the questions posed by this appeal is what body of state law governs this action. Plaintiffs originally filed this action in Maryland, basing their choice of venue on 28 U.S.C. § 1391(b), which provides that a civil action not founded on diversity of citizenship must be brought in the judicial district where all the defendants reside or in the judicial district in which the claim arose. Some of the defendants in this case, Dominion's officers and attorney, are residents of Virginia, while Dominion's place of business is a fact in dispute. Venue was improper in Maryland on the basis of the residency of the defendants because all of the defendants did not reside there. *Id*; 15 Wright & Miller, Federal Practice & Procedure § 3805. Venue in Maryland also could not be based on the locus of the plaintiffs' claim because the alleged misrepresentations and breaches occurred in

Virginia. The parties subsequently stipulated to a change of venue to Virginia.

Because venue was improper in Maryland, transfer of the plaintiffs' action was required under 28 U.S.C. § 1406(a). A district court receiving a case under the mandatory transfer provisions of § 1406(a) must apply the law of the state in which it is held rather than the law of the transferor district court. Manley v. Engram, 755 F.2d 1463, 1467 n.10 (11 Cir. 1985); Gonzalez v. Volvo of America Corp., 734 F.2d 1221, 1223-24 (7 Cir. 1984); Martin v. Stokes, 623 F.2d 469, 472 (6 Cir. 1980). Absent such a rule, plaintiffs could benefit from bringing an action in an impermissible forum, thereby encouraging filing of actions in states with substantive rules that favor the plaintiff. Martin v. Stokes, *supra*, at 472. Thus, the courts have generally concluded that a transferee district court under § 1406(a) must apply the law of its own state to avoid forum shipping by plaintiffs in jurisdictions in which venue is improper. Virginia law therefore governs this action.

III.

Dominion challenges in this appeal the award of punitive damages on the ground that punitive damages are not authorized under Virginia law for the breach of the contractual duties of a partnership or, in the alternative, because the award was barred by the appropriate statute of limitations. It is a general rule that a breach of contract does not justify an award of punitive damages. A & E Supply Co. v. Nationwide Mutual Fire Insurance Co., 798 F.2d 669 (4 Cir. 1986), *cert. denied*, ___ U.S. ___ (1987). Virginia adheres to this rule. Under Virginia law, exemplary or punitive damages are not allowed for breach of contract irrespective of whether suit is brought *ex delicto* or *ex contractu*. However, where the breach amounts to an independent, willful tort, the plaintiff may assert a separate tort against the alleged breaching party. Kamlar Corp. v. Haley, ___ Va. ___, 299 S.E.2d 514 (1983);

Goodstein v. Weinberg, 219 Va. 105, 245 S.E.2d 140 (1978); Wright v. Everett, 197 Va. 608, 90 S.E.2d 855 (1956).

LaVay's claim of entitlement to punitive damages is clearly grounded on the theory that Dominion's breach of fiduciary duty amounted to an independent tort. LaVay contends that punitive damages were proper because Dominion wantonly disregarded the consequences of its actions despite its fiduciary duties as a partner and as a major financial institution. Whether or not this contention is supported by Virginia law, LaVay cannot rely on the three-year limitation period for breach of contract both as a matter of fact, as well as Virginia law, because its damage award depends on a characterization of Dominion's action as tortious. Va. Code § 8.01-246(4). The one-year limitation period in Virginia for personal actions for which no limitation is otherwise prescribed therefore bars the plaintiff's claim. Va. Code § 8.01-248. *See* Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986) (§ 8.01-248 applies to action for constructive fraud).

Plaintiffs filed this action on September 13, 1985. The district court concluded that the limitation period began running more than one year before the filing of the plaintiffs' action when LaVay became aware in April, 1984, from an examination of land records, that Dominion's attorney Dorn had prepared loan documents for the Florida project for Ben Franklin. Prior to that time, in September, 1983, LaVay was informed that the proposed deal was dead and no loan would be made, causing LaVay to forfeit its deposit to the owners of the Florida real estate. In May, 1984, Gerard LaVay retained counsel to file this case. By May of 1984, LaVay, of necessity, was on notice of potential constructive fraud and breach of fiduciary duty. *See* Va. Code § 8.01-231. Thus, the limitation period for this action, at the latest, began running in May 1984, more than one year and three-months prior to the filing of this action. It follows that the Virginia one-year statute of

limitations for actions in tort bars the plaintiff's award of punitive damages.

We are not persuaded by LaVay's argument that the appropriate limitation period for its claim began to run on October 1, 1984, when LaVay first learned that the Florida real estate in issue had been purchased by Ben Franklin Savings & Loan. At trial, LaVay contended that Ben Franklin had bought this property at the suggestion of an officer of Dominion who tipped a friend at Ben Franklin that a profitable development was available. The plaintiffs concluded that through this action Dominion breached it fiduciary duties to LaVay, and that Dominion breached an oral partnership agreement to develop the property with LaVay. While LaVay learned more information to develop its case in October, plaintiffs clearly had sufficient knowledge in May to put them on notice that they should consider pursuing their rights, as they began to do. Thus, the district court did not err in concluding that the limitations period began running, at the latest, in May, 1984.

On appeal, LaVay also argues that the appropriate limitation period is the five-year limitation period for injury to property, a limitation period normally applied to cases of trespass. Va. Code § 8.01-243. The flaw in this argument is identifying prpoerty belonging to LaVay which has been damaged. LaVay never acquired the Florida property, nor was the property itself damaged. See *Pigott, supra,* (constructive fraud in purchase of real estate is not injury to property for purposes of appropriate limitation period). LaVay characterizes the injury to its property as the injury to its partnership interest; but this argument goes too far, and we reject it. It converts every breach of partnership or contract into the equivalent of an injury to real property.

We therefore hold that the one-year limitation period of § 8.01-248 bars the claim for punitive damages due to Dominion's tortious acts. Therefore we need not consider

Dominion's further contentions that the evidence in this case did not support an award of punitive damages or that the plaintiffs' claim was barred by the Statute of Frauds.

IV.

Defendant Dorn appeals the district court's orders denying his motions for sanctions under Fed. R. Civ. Pr. 11, denying him an award of costs for expert witness expenses, and denying him an award of costs for preparing certain deposition transcripts. We consider these issues seriatim.

A.

Fed. R. Civ. P. 11 requires the imposition of sanctions upon lawyers or their clients who file pleadings which are not reasonably grounded in fact or law. Cohen v. Virginia Electric and Power Co., 788 F.2d 247 (4 Cir. 1986). Dominion's lawyer, Dorn, contends that the complaint filed in this action and subsequent filings alleged frivolous claims as they applied to him. The district court directed a verdict for Dorn after plaintiffs failed to present any evidence that he entered into or breached a fiduciary relationship with LaVay. In fact, evidence suggested that LaVay was aware that Dorn's only fiduciary duty was to his client Dominion.

The district court dismissed the motion for Rule 11 sanctions because it found there was no basis for finding "any frivolousness or any showing that this was a claim not well grounded in fact or law." This conclusion was premature because plaintiffs have yet to state any inquiry or facts which justified their filing a claim against Dorn. The district court should have developed some record on this issue to justify its conclusion regarding the objective basis for the plaintiffs' claims. While the directed verdict alone did not merit an award of sanctions, the plaintiffs were required to demonstrate some reasonable basis for their

filings in regards to Dorn. The district court's conclusion was therefore improper because it was not based on any record of the inquiry, if any, made by LaVay. We vacate the district court's order denying sanctions and remand the case for consideration of whether there was a reasonable basis for the action against Dorn, and if not, consideration of a proper sanction.

B.

The district court denied plaintiff Dorn's request for expert expenses in excess of the statutory allowance of $30 per day for witness fees because Dorn failed to apply to the district court prior to retaining his expert. We need not consider the merits of the district court's basis for denying an award of expert fees because the Supreme Court has recently decided that expert witness fees, absent explicit statutory or contractual authority, are not taxable as costs in amounts exceeding the statutory limit for witness fees of $30 per day. Crawford Fitting Co. v. J.T. Gibbons Inc., ___ U.S. ___, 55 L.W. 4820 (1987). Thus, we affirm the judgment of the district court denying Dorn's request for expert witness fees.

C.

Defendant Dorn also applied for the costs of obtaining deposition transcripts which were not introduced at trial. The district court rejected this application because of its practice of allowing costs only for depositions admitted at trial. The depositions were not admitted at trial. The depositions were not admitted at trial because defendant Dorn won a directed verdict at the conclusion of the plaintiff's case. We think that denial of these costs was improper. The defendant could hardly be expected to delay preparation for trial until after presentation of the plaintiff's case. A district court should award costs when the taking of a deposition is reasonably necessary at the time of its

taking. Schmid v. Forsch, 609 F. Supp. 490, 492 (D.D.Col. 1985). Therefore, we vacate the order of the district court denying costs for these expenses and remand for consideration of whether these costs were reasonably necessary for preparation for trial at the time they were taken. If the district court finds that they were reasonably necessary, it should allow the costs.

V.

Plaintiffs appeal the decision of the district court excluding evidence of lost profits, dismissing their claim under RICO, and ordering a remittitur. We discuss these issues seriatim.

A.

The district court granted Dominion's motion to exclude evidence of lost profits and rejected LaVay's requested jury instruction regarding lost profits. Lost profits are, of course, generally available to a plaintiff as damages in the successful prosecution of a claim for a breach of contract or a breach of fiduciary duty. *See* Restatement (Second) of Contracts § 351 (1979). Damages may not be awarded, however, where an award would be based on an estimate of lost profits which is speculative. *Id.* at § 352. The rule barring an award of speculative profits generally precludes damages for lost profits caused by harm done to a new business. Coastland Corp. v. Third National Mortgage Co., 611 F.2d 969 (4 Cir. 1979); Mullen v. Brantley, 213 Va. 765, 195 S.E.2d 696, 699-700 (1973). On this basis, the district court excluded evidence and rejected an instruction regarding lost profits for the Florida mobile home project because such profits would be speculative. We think that it ruled correctly.

B.

The district court dismissed LaVay's RICO claim because it failed to allege a pattern of racketeering. Plaintiff's

amended complaint alleged a pattern of racketeering against Dominion and Dorn based on predicate acts of mail fraud and wire fraud relating to the financing of LaVay's proposed real estate project. We need not reach the issue of whether dismissal was appropriate on the ground that these predicate acts failed to establish a pattern of racketeering activity, because LaVay is now precluded from asserting fraud in the transaction with Dominion. The district court dismissed the claims of fraud against Dorn, and the jury returned a verdict for Dominion on LaVay's claim of actual fraud. *See* Hurley v. Beech Aircraft Corp., 355 F.2d 517 (7 Cir. 1966), 1966), *cert. denied*,l 385 U.S. 821 (1966) (on remand, plaintiff could not raise claim of breach of warranty because issue of defectiveness of aircraft was conclusively litigated). A RICO claim may not be based on a single noncriminal breach of fiduciary duty, for under no circumstances could a breach of fiduciary duty constitute a pattern of racketeering activity.

Plaintiffs also contend that the district court erred in ordering a remittitur as to the jury's award of punitive damages on the breach of fiduciary duty claim. We need not consider this argument, however, since, as earlier stated, we hold that plaintiffs' claim for punitive damages for breach of fiduciary duty is barred by the applicable statute of limitations.[3]

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[3] In challenging the remittitur of the award of punitive damages, plaintiffs also contend that a remand to the district court is appropriate because the district court entered judgment n.o.v. on LaVay's constructive fraud claim, thereby overturning a jury verdict of $80,000 in compensatory damages. Plaintiff suggests that the jury would have awarded this $80,000 under the breach of fiduciary duty claim if it had not been presented with the alternative constructive fraud claim which was subsequently dismissed as a result of the post-judgment verdict. We perceive two flaws in this argument. First, LaVay accepted a remittitur of its award of damages on the breach of fiduciary duty claim. Thus, it may not argue on appeal that the damage award on that claim should be modified. Donovan v. Penn Shipping Co., 429 U.S. 648 (1977);

To summarize, we affirm the district court's dismissal of LaVay's RICO claim, reverse the award of punitive damages against Dominion following remittitur of the damage award, and affirm the district court's ruling excluding evidence of lost profits. We do not consider the correctness of the award of $1,000 to plaintiffs in compensatory damages. We affirm the district court's denial to defendant Dorn of an award of expert expenses. We vacate the orders of the district court denying Dorn an award of Rule 11 sanctions and costs due to deposition transcripts and remand for further consideration consistent with this opinion.

AFFIRMED IN PART;
REVERSED IN PART;
REMANDED FOR FURTHER PROCEEDINGS.

Call Carl, Inc. v. B.P. Oil Corp., 554 F.2d 623 (4 Cir. 1977), *cert. denied*, 434 U.S. 923 (1977). Second, LaVay has not pointed to any error by the district court which would merit a remand, such as denying a motion for special verdicts to deal with a potential overlapping award. LaVay could have preserved its rights in this regard by suggesting such verdicts.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 86-1699
86-1703
86-1705

THE LAVAY CORPORATION, et al,
Appellees,

versus

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION,
Appellant,

and

WILLIAM L. WALDE, et al,
Defendants.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellees/cross-appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Harvey, Chief United States Dis-

trict Judge and Judge Smalkin, United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. Virginia,
Alexandria Division.

THE LAVAY CORPORATION, et al.,
Plaintiffs,

v.

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION, et al.,
Defendants.

Civ. A. No. 86-0013-A.

Sept. 25, 1986.

Prospective purchaser of property for development brought suit against lender and its officers for fraud and breach of fiduciary duty. Lender moved for judgment notwithstanding verdict or for new trial. The District Court, Cacheris, J., held that: (1) Virginia's one-year statute of limitations barred constructive fraud claim; (2) one-year statute of limitations was inapplicable to breach of fiduciary duty claim; but (3) ratio of 750 to 1 of punitive damages to compensatory damages, in suit by prospective purchaser against lender for breach of fiduciary duty, was excessive and thus, award of $750,000 punitive damages would be reduced to $250,000, which purchaser would be required to accept or subject to new trial on compensatory and punitive damages.

Motion granted in part and denied in part, and remittitur granted

MEMORANDUM OPINION

CACHERIS, District Judge.

This matter is before the court on defendant Dominion Federal Savings & Loan Association's ("Dominion's") Motion for judgment Notwithstanding the Verdict or for a New Trial, pursuant to Rules 50 and 59, Fed.R.Civ.P.

For the reasons set forth, a Judgment Notwithstanding the Verdict is granted to Dominion as to the constructive fraud verdict. Dominion's Motion for Judgment N.O.V. or for a New Trial as to breach of fiduciary duty is denied, but a remittitur of the punitive damage amount is granted.

I

Background

Plaintiff, The LaVay Corporation ("LaVay"), instituted suit in September, 1985, against Dominion and some of its officers and directors to recover damages for breach of contract, fraud, negligent misrepresentation, breach of fiduciary duty, and resentation, breach of fiduciary duty, and tortious interference with contractual relations. At the conclusion of plaintiff's evidence, the court dismissed the individual defendants and granted Dominion's Motion for a Directed Verdict as to the tortious interference claim. On July 7, 1986, the jury returned a verdict in favor of plaintiff LaVay, on the claim of constructive fraud, awarding $80,000, and in favor of LaVay on the breach of fiduciary duty count, awarding $1,000 compensatory damages and $750,000 punitive damages.[1] The jury found for Dominion on the breach of contract and fraud counts. On July 17, 1986, Dominion filed the Motion for Judgment

[1] Initially, the jury returned a verdict for LaVay on the breach of fiduciary duty claim in the amount of $750,000 punitive, but no compensatory damages. The court instructed the jury to redeliberate on the verdict, and they reached the $1,000 compensatory damage figure.

N.O.V. or for a New Trial on the constructive fraud and breach of fiduciary duty claims.

The trial evidence showed that in March, 1983, LaVay entered into a contract with Waterwood Homes Corporation to buy approximately 800 acres of Savannah Land in Florida. In the spring of 1983, LaVay and Dominion's officers and directors discussed a possible loan commitment by Dominion to fund development of LaVay's proposed Savannah Club project on the land. At the end of July or early August, 1983, LaVay entered into an oral partnership agreement with Dominion to develop the Savannah Club. Dominion officers, after viewing the land in August, 1983, represented to LaVay that the deal would be closed within seven to ten days.

In late August, 1983, Dominion gave LaVay its written commitment letter, which LaVay felt was a breach of the earlier oral agreement. On Septembe 22, 1983, however, Dominion indicated it would increase the loan amount in the letter by $140,000. On that basis, LaVay relinquished a $50,000 down payment to Waterwood Homes Corporation.

On September 23, 1983, Dominion advised LaVay by letter that it was then disinclined to provide the additional $140,000 and gave LaVay an extension until September 26, 1983, to return the signed commitment letter. Later on September 23, 1983, Dominion advised LaVay the deal was dead due to unsatisfactory appraisal results.

In April, 1984, LaVay became aware of ongoing development of the Savannah Club. General LaVay searched the Florida land records for the source of financing, and turned the matter over to his attorneys in April, 1984. As a result of the lost commitment letter, LaVay incurred $85,000 in damages.

II

Discussion

In deciding a Motion for Judgment Notwithstanding the Verdict under Rule 50, the question to be resolved is whether there is evidence upon which a jury can properly find a verdict. *Ralston Purina Co. v. Edmunds*, 241 F.2d 164, 167 (4th Cir.1957), *cert. denied*, 353 U.S. 974, 77 S.Ct. 1059, 1 L.Ed.2d 1136 (1957). The court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. *Lynch v. Universal Life Church*, 775 F.2d 576, 580 (4th Cir.1985); *see also*, 9 Wright & Miller, *Federal Practice and Procedure*, § 2524 at 543-545 (1971). The court's role in ruling on a motion for a new trial under Rule 59 differs, however, from its role in ruling on a motion for judgment N.O.V.

The distinction between the court's function in each motion has been stated as follows:

> There is a significant difference between deciding a motion for judgment notwithstanding the verdict and deciding a motion for a new trial. The trial court is prohibited from assessing the credibility of witnesses and weighing the evidence when ruling on a motion for judgment notwithstanding the verdict.
>
> In contrast, the trial court can weigh evidence and assess credibility in deciding whether to grant a new trial. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir.1980). The court should exercise its discretion to grant a new trial 'whenever, in its judgment, this action is required in order to prevent injustice.' 11 Wright & Miller, *Federal Practice and Procedure*, § 2805 at 38 (1973). This includes ordering a new trial when the jury verdict is contrary to the weight of evidence.

Whalen v. The Roanoke County Board of Supv., 769 F.2d 221, 226 (4th Cir.1985)

With these general principles in mind, the court turns to the various issues raised by the jury verdict.

A. *Construction Fraud*

Dominion argues that the constructive fraud verdict should be set aside because the Virginia one-year statute of limitations bars this cause of action. LaVay would have the court instead apply the Maryland three year statute of limitations. If Virginia law applies, however, LaVay argues first, that the Virginia five year statute of limitations governs this action, and alternatively that, even if the court applies the one year statute of limitations, the suit is timely.

The first question is whether Maryland or Virginia law governs the application of the statute of limitations. This case was originally filed on September 13, 1985, in the United States District Court for the District of Maryland. On December 10, 1985, the United States District Court for the District of Maryland, by stipulation and order, transferred this case to the Eastern District of Virginia. The venue issue arises now because the United States District Court for the District of Maryland did not state the code section under which it was transferring this case. If the transfer was based on 28 U.S.C. § 1406(a) (improper venue) the law of Virginia should apply. If the action was transferred pursuant to 28 U.S.C. § 1404(a) (forum non conveniens), however, the law rules of original forum apply when case transferred under 28 U.S.C. § 1404(a)).

In this case, the defendants moved in the District of Maryland to have the case dismissed, or in the alternative, to have the case transferred to the Eastern District of Virginia based on improper venue. The venue code section, 28 U.S.C. § 1391(b), provides that:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which in the claim arose, except as otherwise provided by law.

All four of the individual defendants resided in Virginia, and not Maryland, at the time suit was filed. The plaintiffs chose to include the individual defendants with claims under the Racketeer Influenced and Corrupt Organizations Act and tortious interference with contract. Additionally, trial evidence indicated that the claims and cause of action arose in Virginia. Even if Dominion transacted business in Maryland, venue was improper under 1391(b) because the presence of the named individual defendants precluded venue in Maryland. Accordingly, the court should apply Virginia law because the transfer, based on improper venue, was validly made pursuant to Section 28 U.S.C. § 1406(a). In this situation, the transferee court must apply its own law. *See Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.Wd 945 (1964).

As Virginia law governs the statute of limitations issue, the next question is the length of the Virginia Statute of Limitations for this action. The Virginia Supreme Court in a recent case, *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179 (1986), held that the statute of limitations for fraud and constructive fraud is one year. *See* Va. Code § 8.01-248.

Finally, the court must determine when the cause of action for fraud accrued. Section 8.01-249, Va.Code, as amended, provides that a cause of action for fraud accrues when the fraud "is discovered or by the exercise of due diligence reasonably should have been discovered." The evidence indicates that after the original deal died in September, 1983, Gerard LaVay went by the Savannah Club project in April, 1984, to inquire into its status. At that time, he examined the land records and learned that there had been a loan made by Ben Franklin Savings and Loan

regarding Waterwood Homes, and that Mr. William J. Dorn, acting as an agent, had prepared the loan documents. He made copies of those records and had them examined in late fall of 1984. (Trial transcript, July 1, 1986, pp. 442, 443, 445). LaVay then hired his attorney to bring the law suit in May, 1984. (Trial transcript, July 1, 1986, p. 491). Viewing the evidence most favorably to LaVay, it would still appear that the LaVay Corporation was aware or by the exercise of due diligence could have discovered the constructive fraud in April or May of 1984. Since the suit was not filed until September 13, 1985, the Virginia one year statute of limitations bars this action.

Therefore, the court grants the Motion for Judgment Notwithstanding the Verdict as to the constructive fraud claim.

B. *Breach of Fiduciary Duty*

Dominion also contends that the one year statute of limitations applies to bar the $750,000 punitive damage and $1,000 compensatory damage verdict in favor of LaVay. The jury found that a partnership agreement, which gave rise to fiduciary duties, was formed between LaVay and Dominion. Va.Code Section 8.01-246 provides that the statute of limitations shall be, ". . . 4. In action by a partner against another for settlement of the partnership account . . . within five years from the cessation of the dealings in which they are interested together; 4. In actions upon any unwritten contract, express or implied, within three years." Whether the court applies a three or five year statute of limitations under this section, LaVay's action for bring this suit is timely, and therefore, the court denies the Motion for Judgement Notwithstanding the Verdict or for a New Trial on the grounds that the statute of limitations bars the breach of fiduciary duty claim.

C. *Damages*

Dominion also moved for a new trial on the ground that the jury award is excessive, contrary to law, and consti-

tutes a miscarriage of justice. The determination of whether a jury verdict in a diversity case is excessive is left to state substantive law. *Quality Foods, Inc. v. U.S. Fire Insurance Co.*, 715 F.2d 539, 542 n. 2 (11th Cir.1983).[2] Hence, Virginia law applies in determining the property of the amount of punitive damages.

In Virginia, the standard for granting a new trial based on an excessive verdict is that a new trial may be granted if the amount awarded "is so grant as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice." *Rutherford v. Zearfoss*, 221 Va. 685, 272 S.E.2d 225 (1980). Moreover, although the amount to award the wronged party is a matter within the discretion of the jury, if the trial court concludes that a verdict is excessive, it also has the authority under Virginia Code Sections 8.01-383 and 8.01-383.1 (Repl. Vol. 1984) to require plaintiff to remit a portion of the award or to submit a new trial. *See Sampson v. Sampson*, 221 Va. 896, 275 S.E.2d 597, 601 (1981); *Edmiston v. Kupsenel*, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964); *United Construction Workers v. Laburnum*, 194 Va. 892, 75 S.E.2d 694 (1953), *aff'd* 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954). If a new trial is ordered, it is within the trial court's discretion to grant a new trial on all issues or soley on the issue of damages. *Sampson v. Sampson, supra; Rutherford v. Zearfoss*, 221 Va. at 689-90, 272 S.E.2d at 228 (1980).

In determining excessiveness, some courts hold that a punitive damage award need not bear any reasonable relationship to the compensatory damages, while others, in-

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[2] *Cf. Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649-50, 97 S.Ct. 835, 837, 51 L.Ed.2d 112 (1977) in which the Supreme Court noted that "the proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law" and held that federal law prohibits a plaintiff who accepts a remittitur under protest from challenging it on appeal.

cluding Virginia, hold that punitive damages must be reasonably proportionate to the actual damages sustained. *See generally*, 22 Am.Jur.2d, Damages § 265 (1965); "Sufficiency of Showing of Actual Damages to Support an Award of Punitive Damages," 40 A.L.R. 4th 11 (1985). The Virginia Supreme COurt in *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 747 (1985), *cert. denied sub nom, Fleming v. Moore*, ___ U.S. ___, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985), held:

> The amount of punitive damages awarded should bear some reasonable relationship to actual damages sustained and to the measure of punishment required; otherwise an award on its face indicates prejudice or partiality.

Where a punitive award is substantially in excess of what ordinarily might be expected as punishment, the trial court has a duty to annul the award unless the circumstances are so egregious as to merit the award. *Id.*, 325 S.E.2d at 746.

Here, the ratio 750 to 1 appears to be out of balance.[3] In contrast to this award, courts have found a reasonable relationship between punitive and compensatory damages in an action for breach of a broker's common-law fiduciary duty where the ratio was two to one. *Miley v. Oppenheimer*

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[3] Other jurisdictions have used ratios in determining punitive damages and compensatory damages. *See Aspinwall v. Gowens*, 405 So.2d 134 (Ala. 1981) (The jury awarded $1 million to the insured party against the insurer following its failure to pay a claim slightly over $2,000 under a medical policy). The Alabama Supreme Court ordered a remittitur of $750,000. *See also, Wetherbee v. United Insurance Co.*, 18 Cal.App.3d 266, 95 Ca.Rptr. 678 (1971) ($200,000 punitive damages against insurer for failure to pay benefits held not to be excessive, although actual damages were only $1,050). This court is *LaRouche v. National Broadcasting Co.*, 12 Media Law Reporter 1585, 19 Fed.R.Evid.Serv. 990 (E.D. Va. 1985), *aff'd on other ground*, 780 F.2d 1134 (4th Cir.1986), reduced the $3 million punitive damage award to $200,000 where the compensatory damages were $2,000.

& Co., 637 F.2d 318 (5th Cir.1981), *reh. denied*, 642 F.2d 1210 (5th Cir.) (Jury awarded $54,000 in compensatory and $100,000 in punitive damages). The court noted that four factors are considered by Texas courts: 1) degree of outrage produced by the evil, 2) frequency of the evil, 3) size of award needed to deter similar wrongs in the future, and 4) ratio between exemplary and actual damages. *See also, Morrill v. Becton, Dickinson and Co.*, 747 F.2d 1217 (8th Cir.1984) (In breach of contract and fraud action where compensatory damages against Becton were $2,125,000, court ordered remittitur of punitive damage award from $20,000,000 to $3,000,000 finding the original verdict excessive but not "shocking").

In the case at bar the court feels that 750 to 1 ratio is out of balance considering the above factors, and that an award of 250 of 1 would be more appropriate. The verdict does not shock the conscience of the court: the defendant is a large savings and loan association engaged in a multi-million dollar transaction. A new trial is thus not appropriate if the punitive damage award is reduced to a reasonable amount. Under Rule 59, Fed.R.Civ.P., and Va.Code § 8.01-383, *et seq.*, the court may order a remittitur. *See* 11 Wright & Miller, *Federal Practicer and Procedure*, § 2807 at 51-52. Therefore, the court will reduce the punitive damage award from $750,000 to $250,000 and require the plaintiffs to accept the remittitur or submit a new trial on compensatory and punitive damages.

An appropriate Order shall issue.

ORDER

In accordance with the accompanying Memorandum Opinion, it is accordingly

ORDERED:

(1) that the defendant Dominion Federal Savings and Loan Association is GRANTED a Judgment Notwithstand-

ing the Verdict as to plaintiffs' Judgment in the amount of $80,000 for constructive fraud. Plaintiffs' Complaint for constructive fraud is DISMISSED with prejudice.

(2) that the defendant Dominion Federal Savings and Loan Association's Motion for Judgment N.O.V. or for a New Trial as to breach of fiduciary duty is DENIED. Defendant Dominion Federal Savings and Loan Association is GRANTED a remittitur on the breach of fiduciary duty verdict. Judgment is ENTERED in favor of plaintiff The LaVay Corporation and against the defendant Dominion Federal Savings and Loan Association in the amount of $1,000 compensatory damages and $250,000 punitive damages, plus costs and interest for breach of fiduciary duty.

(3) that the plaintiff shall have until October 15, 1986, to advise the court as to whether or not they wish to accept the remittitur or a new trial on compensatory and punitive damages for breach of fiduciary duty. Should the plaintiff elect to have a new trial, then counsel shall appear in this court on October 17, 1986, at 10:00 a.m. for the purpose of setting a new trial date.

APPENDIX D

K. CERTIFICATION OF QUESTIONS OF LAW

Rule 5:42. Certification Procedures.

(a) *Power to Answer.*—The Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decision of the Supreme Court or the Court of Appeals of Virginia.

(b) *Method of Invoking*—This Rule may be invoked only by an order of one of the courts referred to in section (a). No party litigant in the foregoing courts may file in the Supreme Court a petition or motion for certification.

(c) *Contents of Certification Order*—A certification order shall set forth:

(1) the nature of the controversy in which the question arises;

(2) the question of law to be answered;

(3) a statement all facts relevant to the question certified;

(4) the names of each of the parties involved;

(5) the names, addresses, and telephone numbers of counsel for each of the parties involved;

(6) a brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court; and

(7) a brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals of Virginia and the reasons why such decisions are not controlling.

(d) *Preparation of Certification Order.*—The certification order shall be prepared by the certifying court, signed by the presiding justice or judge, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the certified question. The Supreme Court may in its discretion restate any question of law certified or may request from the certifying court additional clarification with respect to any question certified or with respect to any facts.

(e) *Notification of Acceptance or Rejection.*—The Supreme Court, in its discretion, may decide whether to answer any certified question of law. The Supreme Court will notify the certifying court and counsel for the parties of its decision to accept or to reject any certified question of law. A notice accepting a question will include a briefing schedule and, if oral argument is permitted by the Supreme Court, a tentative date and the length of time allowed for such argument.

(f)) *Revocation of Acceptance.*—The Supreme Court, in its discretion, may revoke its decision to answer a certified question of law at any time. Upon deciding to revoke, the Supreme Court will notify the certifying court and counsel for the parties of its action.

(g) *Costs of Certification.*—Fees and costs shall be the same as in civil appeals docketed in the Supreme Court and shall be paid as ordered by the certifying court in its order of certification.

(h) *Briefs.*—The form, length, and time for submission of briefs shall comply with Rules 5:26 through 5:34 *mutatis mutandis.*

(i) *Opinion.*—A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports.

Cross reference.—As to certification of questions of law, see Va. Const., Art. VI, § 1.

Effective date.—This rule was adopted Jan. 16, 1987, and became effective Apr. 1, 1987.

APPENDIX E

Personal Actions Generally.

§ 8.01-243. Personal action for injury to person or property generally.—A. Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the r result of a personal injury or loss of services of such infant, shall be brought within five years next after the cause of action shall have accrued. (Code 1950, § 8-24; 1954, c. 589; 1973, c. 385; 1977, c. 617.)

§ 8.01-246. Personal actions based on contracts.—Subject to the provisions of § 8.01-243 regarding injuries to person and property of § 8.01-245 regarding the application of limitations to fiduciaries, and their bonds, actions founded upon a contract, other than actions on a judgment or decree, shall be brought within the following number of years next after the cause of action shall have accrued:

1. In actions or upon a recognizance, except recognizance of bail in a civil suit, within ten years; and in actions or motions upon a recognizance of bail in a civil suit, within three years, omitting from the computation of such three years such time as the right to sue out such execution shall have been suspended by injunction, supersedeas or other process;

2. In actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby, or by his agent, within five years whether such writing be under seal or not;

3. In actions by a partner against another for settlement of the partnership account or in actions upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, within five years from the cessation of the dealings in which they are interested together;

4. In actions upon any unwritten contract, express or implied, within three years.

Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable, that section shall be controlling except that in products liability actions for injury to person and for injury to property, other than the property subject to contract, the limitation prescribed in § 8.01-243 shall apply. (Code 1950, §§ 8-13, 8-17, 8-23; 1964, c. 219; 1966, c. 118; 1977, c. 617.)

§ 8.01-248. Personal actions for which no other limitation is specified.—Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued. (Code 1950, § 8-24; 1954, c. 589; 1973, c. 385; 1977, c. 617.)

§8.01-249. When cause of action shall be deemed to accrue in certain personal actions.—The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud, or mistake, and in actions for rescission of contract for undue influence, when such fraud, mistake, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

2. In actions or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, when a request in writing be made therefor by check, order or otherwise;

3. In actions for malicious prosecution or abuse of process, when the relevant criminal or civil action is terminated. (Code 1950, §§ 8-13, 8-14; 1964, c. 219; 1966, c. 118; 1977, c. 617.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 86-0013-A

THE LAVAY CORPORATION, et al.

Plaintiffs

vs.

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.

Defendants

PROFFER OF FACTS IN SUPPORT OF RICO CLAIMS UNDER COUNT VI

Plaintiffs proffer the following testimony, in summary form, which they would have adduced at trial had Count VI of the Amended Complaint not been dismissed:

Gerard LaVay and Richard LaVay would have testified or produced documentary evidence that:

1. In furtherance of the scheme or artifice to defraud or obtain substantial sums of money from LaVay, Dominion Federal represented to LaVay by its actions and by express representations that it would loan money to LaVay for the financing of the purchase of the Savanna Club Project and would be LaVay's fifty percent (50%) partner in the development of the Savanna Club Project.

2. In reliance upon Dominion Federal's representations, LaVay forfeited the deposit under the Waterwood Contract, paid sums of money to Dominion Federal as a loan commitment fee, paid sums of money to Dominion Fed-

eral's wholly owned subsidiary American Appraisal Service for an appraisal, obtained an extension of the Waterwood Contract, provided information to Defendants concerning the Savanna Club Project, and employed and paid sums of money to Defendant Dorn as its attorney.

3. For the purpose of executing its scheme or artifice, or attempting to do so, Defendants knowingly caused to be placed or placed in an authorized depository for mail, and also received or took delivery from the postal service, matters or things including, but not limited to, the following:

Letter
Dated: May 26, 1983
From: LaVay
To: Bray

Memorandum
Dated: June 24, 1983
From: American
To: LaVay

Letter
Dated: June 24, 1983
From: LaVay
To: American

Letter
Dated: July 5, 1983
From: CFS and Associates, Inc.
To: Dominion Federal and Bray with a copy to Richard LaVay

Letter
Dated: July 7, 1983
From: LaVay
To: Bray

Letter
Dated: July 20, 1983
From: CFS and Associates, Inc.
To: LaVay with a copy to American

Letter
Dated: July 20, 1983
From: LaVay
To: Bray

Letter
Dated: July 25, 1983
From: LaVay
To: American

Letter
Dated: August 11, 1983
From: LaVay
To: Dorn

Letter
Dated: August 30, 1983
From: LaVay
To: Bray

Letter
Dated: September 8, 1983
From: LaVay
To: Dorn

Letter
Dated: September 12, 1983
From: Thomas A. Sheehan, III
(attorney for LaVay)
To: Bray

Letter
Dated: September 13, 1983
From: LaVay
To: Dominion Federal with a copy to Dorn

Letter
Dated: September 13, 1983
From: Thomas A. Sheehan, III
To: Dorn

Two Letters
Dated: September 14, 1983
From: LaVay
To: Bray with copy to Dorn

Letter
Dated: September 15, 1983
From: Thomas A. Sheehan, III
To: Bray

Letter
Dated: September 16, 1983
From: LaVay
To: Bray and Dominion Federal, with a copy to Dorn

4. The aforesaid use of the mail for the purpose of executing the scheme or artifice to defraud or obtain substantial sums of money from LaVay is indictable as mail fraud and is in violation of the provisions of 18 U.S.C. §1341.

5. For the purpose of executing its scheme or artifice, or attempting to do so, Defendants knowingly transmitted or caused to be transmitted by means of wire in interstate commerce, by telephone, representations and promises between each other, to and from LaVay, Richard LaVay, Waterwood, and Ben Franklin Savings and Loan Association, including, but not limited to, telephone calls on or about the following dates:

March 15, 1983
Between LaVay, and Neal to discuss the Rock Creek Gardens Project in Silver Spring, Maryland and

to set appointment to meet for discussion. A general mention was made by the LaVays of the Savanna Club Project. David Neal indicated an interest in the project and asked the LaVays to discuss it with him further.

March 24, 1983
Between LaVay, Neal and Walde to discuss general lending requirements for the Savanna Club Project and to set appointment to meet for discussion on March 25, 1983.

April 6, 1983
Between Richard LaVay and Bray to discuss development criteria and set appointment to meet for discussion on April 11, 1983.

May 5, 1983
Between LaVay and Neal to discuss terms, conditions and objectives of agreement and to set appointment to meet for discussion.

May 9, 1983
Between LaVay, Neal and Walde to discuss general terms of loan and to set appointment to meet for discussion.

May 18, 1983
Between Richard LaVay and Bray to discuss development plan and to set appointment same day to meet for discussion.

August 1, 1983
Between LaVay and Walde to discuss proposed joint venture and to set appointment to meet for discussion.

August 5, 1983
Between LaVay and Walde to discuss terms of commitment letter and to set appointment to meet for discussion. Neal called James Erskine to ad-

vise him that Dominion Federal would close the loan within ten days.

August 15, 1983
Between LaVay and Dorn to confirm appointment to meet for discussion in Florida.

August 31, 1983
Between LaVay and Bray to discuss loan commitment letter and to set appointment to meet for discussion. Bray stated that $10,000.00 of the $15,000.00 fee was for costs incurred for preparation of loan documents by William J. Dorn, Esq.

September 26, 1983
Between LaVay and Dorn concerning letter of September 23, 1983.

6. The aforesaid use of the telephone for the purpose of executing the scheme or artifice to defraud or obtain substantial sums of money from LaVay is indictable as wire fraud and is in violation of the provisions of 18 U.S.C. §1343.

7. Each of the Defendants is a "person" under 18 U.S.C. §1961(3).

8. At all times material hereto, the Defendants and American, Dominion Investments, Inc. ("DI"), and Dominion Mortgage Center, Inc. associated in fact, for the purpose of carrying out the racketeering activity described in this Count VI as an "enterprise" within the meaning of 18 U.S.C. §1961(4) and 18 U.S.C. §1962(c).

9. The execution of the scheme or artifice to defraud or obtain substantial sums of money from LaVay by mail fraud as defined by 18 U.S.C. §1341 and wire fraud as defined by 18 U.S.C. §1343 constitute "racketeering activity" under 17 U.S.C. §1961(1)(B).

10. Dominion Federal and the other Defendants engaged in a "pattern of racketeering activity" pursuant to 18 U.S.C. §1961(5) since at least one act of mail fraud took place after October 15, 1970, the effective date of RICO, and the last act of mail fraud occurred within ten (10) years after the commission of a prior racketeering activity, which racketeering activity produced a pattern of transactions which were both continuing and related in which the Defendants regularly, wrongfully and illegally took over construction projects or proposed construction and development projects belonging to Dominion Federal's Borrowers and individuals to whom loan commitments had been made.

11. The pattern of racketeering activity, insofar as it directly affected LaVay, consisted of the following series of fraudulent schemes: the scheme to obtain the appraisal fee from LaVay; the scheme to obtain the commitment fee from LaVay; the scheme to cause LaVay to forfeit his deposit and pay an extension fee to Waterwood Homes; the scheme to divert the dealt to Ben Franklin Savings and Loan Association.

James L. Brehony would have testified or produced documentary evidence that:

12. The pattern of racketeering activity, insofar as it affected persons other than LaVay includes similar fraudulent schemes, including, but not limited to, one project among others during the months of October, November and December 1982, Defendants undertook a course of conduct to wrongfully and illegally cause its construction borrower for the projects known as Manchester Lakes Subdivision (the "Property"), to default for purposes of taking over such construction project in order to allow Defendants to divert the profit of such project to Defendants from the construction borrower in the following manner.

13. Specifically in November of 1982, James L. Brehony ("Brehony"), Walde, on behalf of Dominion Federal, en-

tered into an agreement to develop the Property. To this end, Brehony and Walde, on behalf of Dominion Federal, entered into a joint venture agreement. By the terms of this agreement, the parties formed a limited partnership, Manchester Lakes Associates ("MLA"), which became the designated entity for development of the Property. Brehony assigned to MLA his interest in the Property, for which his designees, as aforesaid, received a forty-nine percent interest in MLA. Dominion Federal promised to fully fund acquisition and development costs for the Property in exchange for which its designee, Dominion Financial and Investment Corporation, later DMC received a fifty percent beneficial interest in MLA. The remaining one percent beneficial interest is owned by MDI.

14. By the further terms of the agreement, Dominion Federal controlled all essential operations of MLA through the device of a construction and management "consultant" to MLA, which consultant originally consisted of its wholly-owned and controlled entity American.

15. By the further terms of the agreement, the contributions of Dominion Federal to the development were set out so as to appear to be a loan to MLA. Furthermore, Dominion Federal assured those persons who had contracted to sell various parcels of the Property to Brehony that Dominion Federal was a joint venturer with Brehony in the development of the entire project, and thereby obtained the agreement of a number of these sellers to subordinate their purchase money notes and trusts to the supposed "loan" of Dominion Federal to MLA.

16. As an inducement to obtain the agreement of Brehony to assign his interest in the Property to MLA, Dominion Federal, by its President and Chairman of the Board, Walde, represented that it would fully fund all acquisition and development costs in connection with the planned and contemplated development of the property.

17. The representations were false, in that Dominion Federal never intended to fully fund the development of the Property, but intended to obtain effective control of MLA, to obtain the subordination of the purchase money notes and trusts of the sellers of the Property, and then to obtain outright ownership of the Property, free of the claims of the subordinated noteholders and of Brehony.

18. In accordance with this scheme, plan and intent, Dominion Federal refused to adequately fund the project to permit MLA to complete sufficient of its development commitments to purchasers and thereby to obtain the proceeds of these sales. Moreover, because of the failure and refusal of Dominion Federal to fund the project in accordance with its joint venture obligation, all development of MLA ceased, and MLA became in default of its obligations to the holders of the purchase money indebtedness.

Stuart Mechanic would have testified or produced documentary evidence that:

19. In order to carry out this fraudulent scheme, Defendants hired Stuart Mechanic to prepare a cash flow analysis of said Manchester Lakes project to determine, among other things, at the time of consideration of the project for an acquisition/development loan, at what point the construction borrower should be forced into default and foreclosure in order to maximize the profits to Defendants.

James L. Brehony would have testified or produced documentary evidence that:

20. For the purpose of executing this fraudulent scheme, Defendants knowingly caused to be placed or placed in an authorized depository for mail, and also received or took delivery from the postal service, matters or things including, but not limited to, the following:

Letter
Dated: November 19, 1982
From: Neal
To: Brehony

Letter
Dated: January 31, 1983
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Letter
Dated: May 9, 1983
From: Walde
To: Brehony

Letter
Dated: May 9, 1983
From: Walde
To: Brehony

Letter
Dated: November 1, 1983
From: Bruce D. Lyons
To: Brehony

Letter
Dated: January 10, 1984
From: Brehony
To: Debbie S. Waldon, Dominion Federal

Letter
Dated: March 21, 1984
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Letter
Dated: May 7, 1984
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Letter
Dated: June 18, 1984
From: Robert J. Mikulski, Dominion Federal
To: Brehony

Letter
Dated: June 20, 1984
From: Brehony
To: Robert J. Mikulski, Dominion Federal

Letter
Dated: July 23, 1984
From: Brehony
To: Robert J. Mikulski, Dominion Federal

Letter
Dated: October 18, 1984
From: Brehony
To: Debbie S. Waldon, Dominion Federal

Letter
Dated: October 22, 1984
From: Brehony
To: Walde

Letter
Dated: October 23, 1984
From: Z.J. Chelec, Dominion Federal
To: Brehony

Letter
Dated: October 24, 1984
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Invoice
Dated: November 1, 1984
From: Dominion Investments, Inc.
To: Manchester Lakes Associates

Letter
Dated: November 2, 1984
From: Robert J. Mikulski, Dominion Federal
To: Brehony

Invoice
Dated: December 3, 1984
From: Dominion Investment, Inc.
To: Westbury Oaks Development Corp.

Letter
Dated: August 5, 1985
From: Dorn
To: Joseph Alexander

Letter
Dated: August 23, 1985
From: Brehony
To: Joseph Alexander

21. The aforesaid use of the mail for the purpose of executing this fraudulent scheme is indictable as mail fraud and is in violation of the provisions of 18 U.S.C. §1341.

22. For the purpose of executing this fraudulent scheme, or attempting to do so, Defendants knowingly transmitted or caused to be transmitted by means of wire in interstate commerce, by telephone, representations and promises calls including, but not limited to, telephone calls on or about the following dates:

November 1, 1982
Between Neal and Brehony to discuss letter of intent to fund Manchester Lakes.

December 5, 1982
Between Dorn and Brehony to discuss limited partnership agreement.

May 1, 1984
Between Brehony and Bray concerning Wooded Glen financing.

May 2, 1984
Between Brehony and Walde concerning retirement community development.

May 5, 1984
Between Brehony and Bruce Lyons of Dominion Investments to discuss construction management agreement.

October 1, 1984
Between Brehony and Z.J. Chelec, Dominion Federal, concerning Wooded Glen financing.

23. The aforesaid use of the telephone for the purpose of executing this fraudulent scheme is indictable as wire fraud and is in violation of the provisions of 18 U.S.C. §1343.

Gerard LaVay, Richard LaVay and James L. Brehony would have testified or produced documentary evidence that:

24. The Defendants received income, directlv or indirectly, from the pattern of racketeering activities as stated above and used and invested, and conspired to use and invest, directly and indirectly, part of such income, or the proceeds of such income, in the acquisition of an interest in and establishment of an operation of an enterprise as hereinabove described which is engaged in, or the activities of which affect, interstate commerce in violation of 18 U.S.C. §1962(a).

25. The Defendants, as aforesaid, conspired to violate the provisions of 18 U.S.C. §1962(a) and (c) in violation of 18 U.S.C. §1962(d).

Gerard LaVay and Richard LaVay would have testified or produced documentary evidence that:

26. As the direct and proximate result of the aforesaid violations of 18 U.S.C. §1962, LaVay has been injured in its business or property consisting of the loss of substantial

sums of money wrongfully obtained by Defendants through their scheme, the exact amount of which is as yet unknown to LaVay, and has suffered other incidental and consequential damages, plus costs, interest and attorneys' fees.

27. At all times material hereto, as a further part of the scheme or artifice to defraud or obtain substantial sums of money from LaVay, Defendants took and caused to be taken certain actions which had and were intended to have the effect of concealing their fraudulent scheme and actions.

28. LaVay was kept in ignorance of the fraudulent scheme of Dominion Federal by the aforesaid acts of Defendants and did not, or reasonably could not, by the exercise of ordinary diligence, have discovered the existence and extent of the fraudulent scheme of defendants until after September, 1984 as to those acts against LaVay and until after March, 1986 as to the other fraudulent schemes hereinabove stated.

APPENDIX G

COUNT VI

(RICO—Racketeer Influence and Corrupt Organizations Act Violation)

58. Plaintiffs incorporate by reference in this Count VI all the matters and facts alleged in paragraphs 1 through 57 above and reallege such matters as if fully set forth herein, except as inconsistent herewith.

59. At a date(s) and place(s) which are as yet unknown to LaVay, Dominion Federal, Walde, Neal, Bray, Dorn, American, and other individuals whose identities are at this time unknown, devised a scheme or artifice to defraud or obtain substantial sums of money by means of false pretenses, representations, or promises from LaVay.

60. In furtherance of the scheme or artifice to defraud or obtain substantial sums of money from LaVay, Dominion Federal represented to LaVay by its actions and by express representations that it would loan money to LaVay for the financing of the purchase of the Savanna Club Project and would be LaVay's fifty percent (50%) partner in the development of the Savanna Club Project.

61. In reliance upon Dominion Federal's representations, LaVay forfeited the deposit under the Waterwood Contract, paid sums of money to Dominion Federal as a loan commitment fee, paid sums of money to Dominion Federal's wholly owned subsidiary American Appraisal Service for an appraisal, obtained an extension of the Waterwood Contract, provided information to Defendants concerning the Savanna Club Project, and employed and paid sums of money to Defendant Dorn as its attorney.

62. For the purpose of executing its scheme or artifice, or attempting to do so, Defendants knowingly caused to be placed or placed in an authorized depository for mail,

and also received or took delivery from the postal service, matters or things including, but not limited to, the following:

Letter
Dated: May 26, 1983
From: LaVay
To: Bray

Memorandum
Dated: June 24, 1983
From: American
To: LaVay

Letter
Dated: June 24, 1983
From: LaVay
To: American

Letter
Dated: July 5, 1983
From: CFS and Associates, Inc.
To: Dominion Federal and Bray with a copy to Richard LaVay

Letter
Dated: July 7, 1983
From: LaVay
To: Bray

Letter
Dated: July 20, 1983
From: CFS and Associates, Inc.
To: LaVay with a copy to American

Letter
Dated: July 20, 1983
From: LaVay
To: Bray

Letter
Dated: July 25, 1983
From: LaVay
To: American

Letter
Dated: August 11, 1983
From: LaVay
To: Dorn

Letter
Dated: August 30, 1983
From: LaVay
To: Bray

Letter
Dated: September 8, 1983
From: LaVay
To: Dorn

Letter
Dated: September 12, 1983
From: Thomas A. Sheehan, III
(attorney for LaVay)
To: Bray

Letter
Dated: September 13, 1983
From: LaVay
To: Dominion Federal with a copy to Dorn

Letter
Dated: September 13, 1983
From: Thomas A. Sheehan, III
To: Dorn

Two Letters
Dated: September 14, 1983
From: LaVay
To: Bray with copy to Dorn

Letter
Dated: September 15, 1983
From: Thomas A. Sheehan, III
To: Bray

Letter
Dated: September 16, 1983
From: LaVay
To: Bray and Dominion Federal, with a copy to Dorn

63. The aforesaid use of the mail for the purpose of executing the scheme or artifice to defraud or obtain substantial sums of money from LaVay is indictable as mail fraud and is in violation of the provisions of 18 U.S.C. §1341.

64. For the purpose of executing its scheme or artifice, or attempting to do so, Defendants knowingly transmitted or caused to be transmitted by means of wire in interstate commerce, by telephone, representations and promises between each other, to and from LaVay, Richard LaVay, Waterwood, and Ben Franklin Savings and Loan Association, including, but not limited to, telephone calls on or about the following dates:

March 15, 1983
Between LaVay, and Neal to discuss the Rock Creek Gardens Project in Silver Spring, Maryland and to set appointment to meet for discussion. A general mention was made by the LaVays of the Savanna Club Project. David Neal indicated an interest in the project and asked the LaVays to discuss it with him further.

March 24, 1983
Between LaVay, Neal and Walde to discuss general lending requirements for the Savanna Club Project and to set appointment to meet for discussion on March 25, 1983.

April 6, 1983
Between Richard LaVay and Bray to discuss development criteria and set appointment to meet for discussion on April 11, 1983.

May 5, 1983
Between LaVay and Neal to discuss terms, conditions and objectives of agreement and to set appointment to meet for discussion.

May 9, 1983
Between LaVay, Neal and Walde to discuss general terms of loan and to set appointment to meet for discussion.

May 18, 1983
Between Richard LaVay and Bray to discuss development plan and to set appointment same day to meet for discussion.

August 1, 1983
Between LaVay and Walde to discuss proposed joint venture and to set appointment to meet for discussion.

August 5, 1983
Between LaVay and Walde to discuss terms of commitment letter and to set appointment to meet for discussion. Neal called James Erskine to advise him that Dominion Federal would close the loan within ten days.

August 15, 1983
Between LaVay and Dorn to confirm appointment to meet for discussion in Florida.

August 31, 1983
Between LaVay and Bray to discuss loan commitment letter and to set appointment to meet for discussion. Bray stated that $10,000.00 of the $15,000.00 fee was for costs incurred for prep-

aration of loan documents by William J. Dorn, Esq.

September 26, 1983
Between LaVay and Dorn concerning letter of September 23, 1983.

65. The aforesaid use of the telephone for the purpose of executing the scheme or artifice to defraud or obtain substantial sums of money from LaVay is indictable as wire fraud and is in violation of the provisions of 18 U.S.C. §1343.

66. Each of the Defendants is a "person" under 18 U.S.C. §1961(3).

67. At all times material hereto, the Defendants and American, Dominion Investments, Inc. ("DI"), and Dominion Mortgage Center, Inc. associated in fact, for the purpose of carrying out the racketeering activity described in this Count VI as an "enterprise" within the meaning of 18 U.S.C. §1961(4) and 18 U.S.C. §1962(c).

68. The execution of the scheme or artifice to defraud or obtain substantial sums of money from LaVay by mail fraud as defined by 18 U.S.C. §1341 and wire fraud as defined by 18 U.S.C. §1343 constitute "racketeering activity" under 18 U.S.C. §1961(1)(B).

69. Dominion Federal and the other Defendants engaged in a "pattern of racketeering activity" pursuant to 18 U.S.C. §1961(5) since at least one act of mail fraud took place after October 15, 1970, the effective date of RICO, and the last act of mail fraud occurred within ten (10) years after the commission of a prior racketeering activity, which racketeering activity produced a pattern of transactions which were both continuing and related in which the Defendants regularly, wrongfully and illegally took over construction projects or proposed construction and development projects belonging to Dominion Federal's

Borrowers and individuals to whom loan commitments had been made.

70. The pattern of racketeering activity, insofar as it directly affected LaVay, consisted of the following series of fraudulent schemes: the scheme to obtain the appraisal fee from LaVay; the scheme to obtain the commitment fee from LaVay; the scheme to cause LaVay to forfeit his deposit and pay an extension fee to Waterwood Homes; the scheme to divert the deal to Ben Franklin Savings and Loan Association.

71. The pattern of racketeering activity, insofar as it affected persons other than LaVay includes similar fraudulent schemes, including, but not limited to, one project among others during the months of October, November and December 1982, Defendants undertook a course of conduct to wrongfully and illegally cause its construction borrower for the projects known as Manchester Lakes Subdivision (the "Property"), to default for purposes of taking over such construction project in order to allow Defendants to divert the profit of such project to Defendants from the construction borrower in the following manner.

72. Specifically in November of 1982, James L. Brehony ("Brehony"), Walde, on behalf of Dominion Federal, entered into an agreement to develop the Property. To this end, Brehony and Walde, on behalf of Dominion Federal, entered into a joint venture agreement. By the terms of this agreement, the parties formed a limited partnership, Manchester Lakes Associates ("MLA"), which became the designated entity for development of the Property. Brehony assigned to MLA his interest in the Property, for which his designees, as aforesaid, received a forty-nine percent interest in MLA. Dominion Federal promised to fully fund acquisition and development costs for the Property in exchange for which its designee, Dominion Financial and Investment Corporation, later DMC received a

fifty percent beneficial interest in MLA. The remaining one percent beneficial interest is owned by MDI.

73. By the further terms of the agreement, Dominion Federal controlled all essential operations of MLA through the device of a construction and management "consultant" to MLA, which consultant originally consisted of its wholly-owned and controlled entity American.

74. By the further terms of the agreement, the contributions of Dominion Federal to the development were set out so as to appear to be a loan to MLA. Furthermore, Dominion Federal assured those persons who had contracted to sell various parcels of the Property to Brehony that Dominion Federal was a joint venturer with Brehony in the development of the entire project, and thereby obtained the agreement of a number of these sellers to subordinate their purchase money notes and trusts to the supposed "loan" of Dominion Federal to MLA.

75. As an inducement to obtain the agreement of Brehony to assign his interest in the Property to MLA, Dominion Federal, by its President and Chairman of the Board, Walde, represented that it would fully fund all acquisition and development costs in connection with the planned and contemplated development of the property.

76. The representations were false, in that Dominion Federal never intended to fully fund the development of the Property, but intended to obtain effective control of MLA, to obtain the subordination of the purchase money notes and trusts of the sellers of the Property, and then to obtain outright ownership of the Property, free of the claims of the subordinated noteholders and of Brehony.

77. In accordance with this scheme, plan and intent, Dominion Federal refused to adequately fund the project to permit MLA to complete sufficient of its development commitments to purchasers and thereby to obtain the proceeds of these sales. Moreover, because of the failure and

refusal of Dominion Federal to fund the project in accordance with its joint venture obligation, all development of MLA ceased, and MLA became in default of its obgligations to the holders of the purchase money indebtedness.

78. In order to carry out this fraudulent scheme, Defendants hired Stuart Mechanic to prepare a cash flow analysis of said Manchester Lakes project to determine, among other things, a the time of consideration of the project for an acquisition/development loan, at what point the construction borrower should be forced into default and foreclosure in order to maximize the profits to Defendants.

79. For the purpose of executing this fraudulent scheme, Defendants knowingly caused to be placed or placed in an authorized depository for mail, and also received or took delivery from the postal service, matters or things including, but not limited to, the following:

Letter
Dated: November 19, 1982
From: Neal
To: Brehony

Letter
Dated: January 31, 1983
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Letter
Dated: May 9, 1983
From: Walde
To: Brehony

Letter
Dated: May 9, 1983
From: Walde
To: Brehony

Letter
Dated: November 1, 1983
From: Bruce D. Lyons
To: Brehony

Letter
Dated: January 10, 1984
From: Brehony
To: Debbie S. Waldon, Dominion Federal

Letter
Dated: March 21, 1984
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Letter
Dated: May 7, 1984
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Letter
Dated: June 18, 1984
From: Robert J. Mikulski, Dominion Federal
To: Brehony

Letter
Dated: June 20, 1984
From: Brehony
To: Robert J. Mikulski, Dominion Federal

Letter
Dated: July 23, 1984
From: Brehony
To: Robert J. Mikulski, Dominion Federal

Letter
Dated: October 18, 1984
From: Brehony
To: Debbie S.Waldon, Dominion Federal

Letter
Dated: October 22, 1984
From: Brehony
To: Walde

Letter
Dated: October 23, 1984
From: Z.J. Chelec, Dominion Federal
To: Brehony

Letter
Dated: October 24, 1984
From: Debbie S. Waldon, Dominion Federal
To: Brehony

Invoice
Dated: November 1, 1984
From: Dominion Investments, Inc.
To: Manchester Lakes Associates

Letter
Dated: November 2, 1984
From: Robert J. Mikulski, Dominion Federal
To: Brehony

Invoice
Dated: December 3, 1984
From: Dominion Investment, Inc.
To: Westbury Oaks Development Corp.

Letter
Dated: August 5, 1985
From: Dorn
To: Joseph Alexander

Letter
Dated: August 23, 1985
From: Brehony
To: Joseph Alexander

80. The aforesaid use of the mail for the purpose of executing this fraudulent scheme is indictable as mail fraud and is in violation of the provisions of 18 U.S.C. §1341.

81. For the purpose of executing this fraudulent scheme, or attempting to do so, Defendants knowingly transmitted or caused to be transmitted by means of wire in interstate commerce, by telephone, representations and promises calls including, but not limited to, telephone calls on or about the following dates:

November 1, 1982
Between Neal and Brehony to discuss letter of intent to fund Manchester Lakes.

December 5, 1982
Between Dorn and Brehony to discuss limited partnership agreement.

May 1, 1984
Between Brehony and Bray concerning Wooded Glen financing.

May 2, 1984
Between Brehony and Walde concerning retirement community development.

May 5, 1984
Between Brehony and Bruce Lyons of Dominion Investments to discuss construction management agreement.

October 1, 1984
Between Brehony and Z.J. Chelec, Dominion Federal, concerning Wooded Glen financing.

82. The aforesaid use of the telephone for the purpose of executing this fraudulent scheme is indictable as wire fraud and is in violation of the provisions of 18 U.S.C. §1343.

83. As a result of the aforesaid conduct with respect to Brehony, Dominion Federal and the other Defendants

were persons employed by or associated with an enterprise engaged in, or the activities of which affect, interstate commerce and conspired to, or conducted or participated directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).

84. The Defendants received income, directly or indirectly, from the pattern of racketeering activities as stated above and used and invested, and conspired to use and invest, directly and indirectly, part of such income, or the proceeds of such income, in the acquisition of an interest in and establishment of an operation of an enterprise as hereinabove described which is engaged in, or the activities of which affect, interstate commerce in violation of 18 U.S.C. §1962(a).

85. The Defendants, as aforesaid, conspired to violate the provisions of 18 U.S.C. §1962(a) and (c) in violation of 18 U.S.C. §1962(d).

86. As the direct and proximate result of the aforesaid violations of 18 U.S.C. §1962, LaVay has been injured in its business or property consisting of the loss of substantial sums of money wrongfully obtained by Defendants through their scheme, the exact amount of which is as yet unknown to LaVay, and has suffered other incidental and consequential damages, plus costs, interest and attorneys' fees.

87. At all times material hereto, as a further part of the scheme or artifice to defraud or obtain substantial sums of money from LaVay, Defendants took and caused to be taken certain actions which had and were intended to have the effect of concealing their fraudulent scheme and actions.

88. LaVay was kept in ignorance of the fraudulent scheme of Dominion Federal by the aforesaid acts of Defendants and did not, or reasonably could not, by the exercise of ordinary diligence, have discovered the exist-

ence and extent of the fraudulent scheme of defendants until after September, 1984 as to those acts against LaVay and until after March, 1986 as to the other fraudulent schemes hereinabove stated.

WHEREFORE, Plaintiffs, Gerard M. LaVay and The LaVay Corporation, pray that:

A. It be awarded treble the damages sustained by it, in an amount which is as yet unknown, from Defendants, Dominion Federal Savings and Loan Association, William L. Walde, David A. Neal, James Winston Bray, and William J. Dorn; and

B. That pursuant to 18 U.S.C. §1964(A), this Court award LaVay by any other appropriate order such relief as its case may require.

Supreme Court, U.S.
FILED
JAN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE LAVAY CORPORATION AND
GERARD M. LAVAY,
Petitioners,

v.

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION
AND WILLIAM J. DORN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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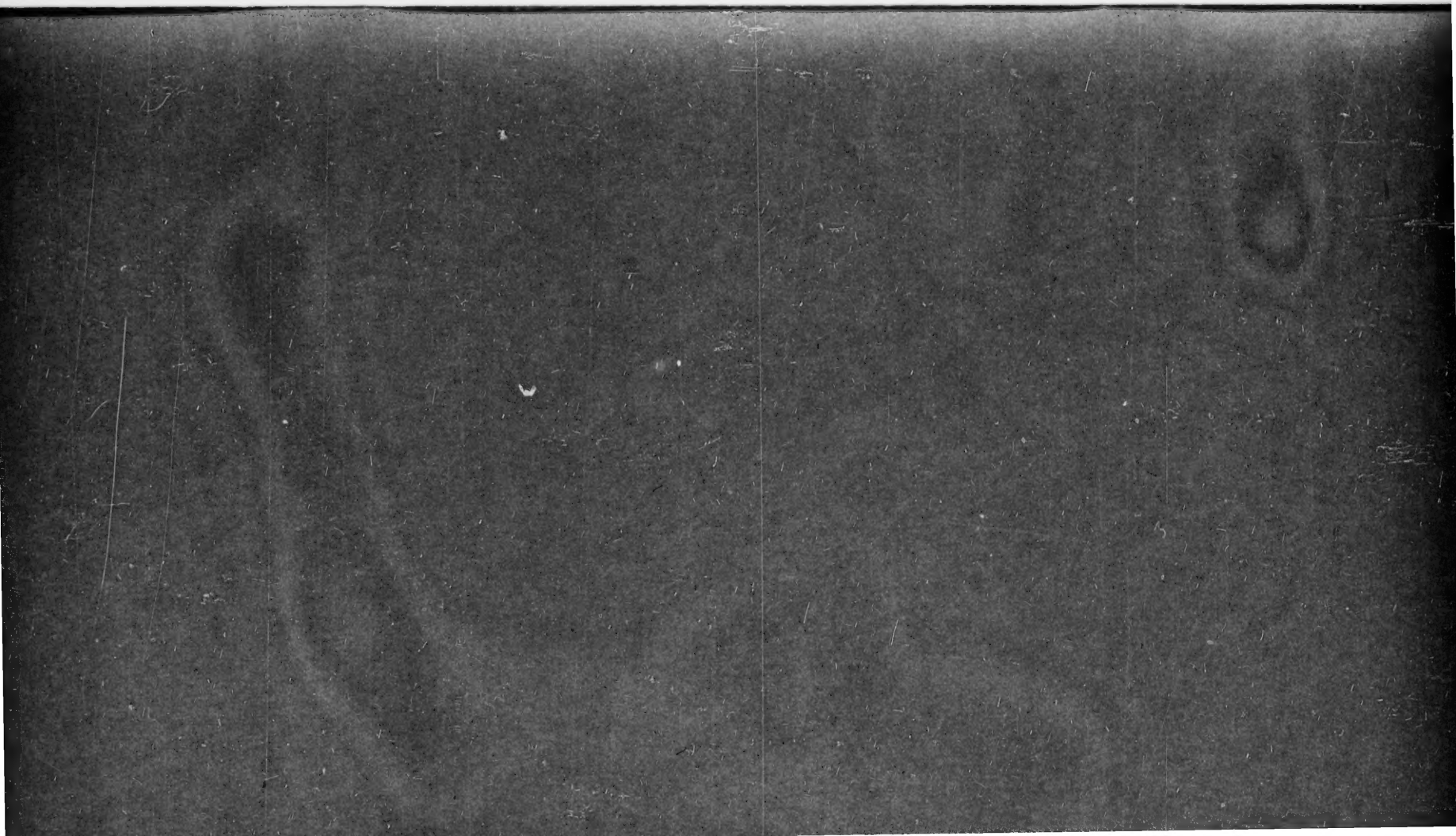

QUESTIONS PRESENTED

1. Should the Supreme Court either determine which statute of limitations is applicable under Virginia law to the petitioners' common law claims of constructive fraud and breach of fiduciary duty or certify those questions to the Virginia Supreme Court? *

2. Did the United States Court of Appeals for the Fourth Circuit err when, based on principles of *res judicata*, it affirmed the dismissal by the United States District Court for the Eastern District of Virginia of the petitioners' claims made pursuant to the Racketeer Influenced and Corrupt Organizations Act?

3. Did the district court err when it applied the substantive law of the transferee forum following a transfer predicated on improper venue?

4. Should *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), which holds that a litigant in federal court cannot appeal from a remittitur order which he has accepted, be reversed?

5. Should the court of appeals be directed to reconsider its decision because it did not address one of the petitioners' arguments where this claim was not raised in the petitioners' Petition For Rehearing And Suggestion For Rehearing Before The Court In Banc? **

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* Pursuant to Supreme Court Rule 28.1, respondent Dominion Federal Savings and Loan Association states that it has no parent companies, affiliates or subsidiaries, other than wholly-owned subsidiaries.

** The additional question of sanctions raised in the petition has been resolved since its filing and is no longer an issue to be addressed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1076

THE LAVAY CORPORATION AND
GERARD M. LAVAY,
Petitioners,

v.

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION
AND WILLIAM J. DORN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Petitioners Gerard LaVay and The LaVay Corporation are real estate developers. Respondent Dominion Federal Savings and Loan Association ("Dominion Federal") is a federally chartered savings and loan association located in Virginia. Respondent William J. Dorn ("Dorn") is a Virginia attorney who has represented Dominion Federal in a variety of matters, including the transaction underlying this case.

In 1983, The LaVay Corporation applied to Dominion Federal for a multi-million dollar loan to be used to acquire land in Florida and then to build a mobile home retirement community to be called "The Savannah Club." The parties negotiated for several months in 1983 concerning the loan, but those negotiations broke down in the fall of that year. Dorn represented Dominion Federal during the latter stages of the negotiations. No loan was ever extended, and this suit followed.

On September 13, 1985, The LaVay Corporation and Gerard LaVay filed their complaint in the United States District Court for the District of Maryland against Dominion Federal, Dorn, and three of Dominion Federal's officers, William L. Walde, David A. Neal and James Winston Bray. All of the defendants were sued under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, *et seq.* Dominion Federal was also sued for breach of contract, breach of fiduciary duty, fraud, constructive fraud and tortious interference with contract. Dorn was sued for breach of fiduciary duty and tortious interference with contract, in addition to the RICO Act claim. The other defendants, who are not respondents in this Court, were sued for tortious interference with contract, also in addition to the RICO Act claims asserted against them.

After the complaint was served, the defendants moved to have the action dismissed because of improper venue and lack of personal jurisdiction or, in the alternative, transferred to the United States District Court for the Eastern District of Virginia, Alexandria Division. The petitioners did not oppose the motion but instead stipulated to the transfer.

The RICO Act claims were dismissed before trial on motion of the defendants because a pattern of racketeering activity, required by that Act, had not been properly alleged. The trial began on June 30, 1986. At the beginning of the trial, the district court granted a motion

in limine filed by the respondents. The court ruled that Virginia law applied to the issue of damages and that it precluded recovery by The LaVay Corporation and Gerard LaVay of profits allegedly lost when The Savannah Club was not developed by them.

At the close of the plaintiffs' case, the district court granted a directed verdict in favor of Dorn on all claims. The district court also granted a directed verdict in favor of all defendants on the interference with contract claim. This ruling had the effect of dismissing the other individual defendants, Messrs. Walde, Neal and Bray, from the case because no claims remained against them.

The remaining claims of The LaVay Corporation and Gerard LaVay against Dominion Federal were decided by the jury. The jury returned verdicts in favor of Dominion Federal on the breach of contract and fraud claims. The jury returned a verdict in favor of The LaVay Corporation on the constructive fraud claim, awarding compensatory damages of $80,000. The jury also returned a verdict in favor of The LaVay Corporation on the breach of fiduciary duty claim, awarding compensatory damages of $1,000 and punitive damages of $750,000. The jury returned verdicts against Gerard LaVay on all counts.

Dominion Federal filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. It moved to have the $80,000 verdict set aside because the constructive fraud claim was barred by the applicable Virginia statute of limitations, Va. Code § 8.01-248. That portion of Dominion Federal's motion was granted. Dominion Federal also moved to have the punitive portion of the verdict on the breach of fiduciary claim set aside because that claim was also untimely under Va. Code § 8.01-248. That request was denied.

Dominion Federal alternatively moved for a new trial on the breach of fiduciary duty claim because the verdict

was excessive. That part of Dominion Federal's motion was granted, with the new trial limted to damages, unless The LaVay Corporation accepted a remittitur of the punitive damages to $250,000. The remittitur was accepted. Judgment was entered against Dominion Federal in favor of The LaVay Corporation in the amount of $251,000.

After the trial, Dorn filed a motion for sanctions pursuant to FED. R. CIV. P. 11 against The LaVay Corporation and Gerard LaVay, arguing that the claims filed and maintained against him were without basis in law or fact and had been brought in violation of that rule. The district court denied the motion.

All parties appealed.[1] Insofar as relevant to the pending petition, the court of appeals (1) ruled that the district court was correct in its determination that Virginia law applied to this case; (2) reversed the district court and held that the punitive damages awarded for breach of fiduciary duty were barred by the applicable Virginia statute of limitations; (3) affirmed the dismissal of the RICO Act claims because the adverse jury verdict on the fraud claim against Dominion Federal and the directed verdict against Dorn precluded the petitioners on remand from proving the predicate acts of mail fraud or wire fraud on which their RICO Act claim was premised; (4) rejected the petitioners' attempt to appeal the remittitur order which they accepted; (5) remanded Dorn's motion for sanctions for consideration by the district court whether there was a reasonable basis for the claims made against him;[2] and (6) noted that the peti-

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[1] The petitioners did not, however, appeal the adverse verdict on the fraud claim against Dominion Federal or the directed verdict in favor of Dorn.

[2] As previously noted, the matter of sanctions has been resolved since the filing of the petition in this Court and is no longer an issue to be addressed.

tioners did not contest the ruling of the district court which set aside the $80,000 constructive fraud verdict.

REASONS FOR DENYING THE WRIT

The writ should be denied because the petition fails to present an important question of federal law which has not been previously considered and determined by this Court. All of the issues on appeal involved either the routine application of well-settled principles of federal law or issues of state law.

I. THE SUPREME COURT SHOULD NOT GRANT THE WRIT TO DETERMINE WHICH VIRGINIA STATUTE OF LIMITATIONS IS APPLICABLE TO CLAIMS OF BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD

Dominion Federal moved the district court to reverse the constructive fraud verdict of $80,000 based on the statute of limitations. The court granted the motion based on the Virginia Supreme Court ruling in *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179 (1986) that Virginia's one year statute of limitations, Va. Code § 8.01-248, applies to claims of constructive fraud. The court of appeals did not address this order in its decision.

Dominion Federal also moved the district court to have the punitive portion of the breach of fiduciary duty verdict reversed based on the statute of limitations. The district court denied the motion, ruling that the claim was timely under either potentially applicable statute of limitations—Va. Code § 8.01-246(3) (five years) or Va. Code § 8.01-246(4) (three years). The court of appeals reversed and held that the one year period provided in Va. Code § 8.01-248 was applicable to this claim as well, relying on the reasoning of *Pigott v. Moran, supra.*

The duty of federal courts to determine and apply state law has been settled since the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The district

court and court of appeals both followed the dictates of *Erie*. The court of appeals simply disagreed with the district court on which statute of limitations is applicable to a claim of breach of fiduciary duty. That the applicable law in Virginia on these issues is unsettled or indeed confusing does not transform the choice between a one, three or five year statute of limitations into an important question of federal law which this Court should answer. That the court of appeals reversed the district court does not affect that conclusion. This Court should decline the petitioners' request that it certify this issue to the Virginia Supreme Court or that it determine the applicable Virginia statute of limitations.

II. THE DISMISSAL OF THE PETITIONERS' RICO ACT CLAIM WAS AFFIRMED BASED ON WELL-SETTLED PRINCIPLES OF *RES JUDICATA* WHICH NEED NOT BE RE-EXAMINED BY THIS COURT

The petitioners' RICO Act claim was dismissed pretrial because the complaint failed to allege a pattern of rackteering activity. The dismissal was affirmed by the court of appeals. It concluded that the unappealed jury verdict in favor of Dominion Federal on the fraud claim and the unappealed directed verdict in favor of Dorn on all claims would preclude the petitioners on remand from proving fraud related to the subject matter of this suit based on the doctrine of *res judicata*. The petitioners therefore could not prove the mail fraud and wire fraud necessary to prevail on their RICO Act claim. This ruling obviated the need to determine whether the dismissal for failure to allege a pattern of rackteering activity was correct.[3]

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[3] Neither the district court's dismissal of the RICO Act claim nor the court of appeals' affirmance was based on the statute of limitations. The petitioners' citation to *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. ——, 107 S. Ct. 2759 (1987) is inapposite.

The court of appeals' holding relies on the routine application of the principles of *res judicata* within the confines of a single action. *See, United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). There is no important federal issue to address.

III. THE APPLICATION OF THE SUBSTANTIVE LAW OF VIRGINIA BY THE TRANSFEREE COURT WAS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

This action was transferred from the district court in Maryland to the district court in the Eastern District of Virginia. This Court held in *Van Dusen v. Barrack*, 376 U.S. 612 (1964) that, where an action is transferred pursuant to 28 U.S.C. § 1404(a) from one district in which venue is proper to another district in which venue is also proper, the transferee court must apply the law of the transferor forum to avoid improper forum shopping by the defendants.

Venue in this action was improper in the transferor forum, however, because the claims did not arise in Maryland nor did all of the defendants reside there. *See*, 28 U.S.C. § 1391(b). If the law of the transferor forum is applied by the transferee court in these circumstances, it is the plaintiffs who will have successfully engaged in improper forum shopping. Such a result would be inconsistent with the reasoning of *Van Dusen v. Barrack*. The transferee court should apply the law of the forum in which it is located. Therefore, the court of appeals affirmed the district court's application of Virginia law to the claims in this action.

The decision reached by the court of appeals in this case is consistent with the decisions of other circuits. *See, Manley v. Engram*, 755 F.2d 1463, 1467 n.10 (11th Cir. 1985); *Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643-644 (9th Cir. 1983);

Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1110 (5th Cir. 1981); *Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980). There is no need for this Court to address this issue, given the consistent rulings of the courts of appeals. This particular question of federal law is well-settled. The petitioners' suggestion that this Court should provide guidance concerning "what forum shopping is permissible," Petition at 16, should be rejected.

IV. *DONOVAN v. PENN SHIPPING* SHOULD NOT BE REVERSED

In 1977, this Court "reaffirm[ed] the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977). The petitioners accepted a remittitur of their punitive damages from $750,000 to $250,000. That they cannot now appeal from it is clear based on *Donovan v. Penn Shipping* and a hundred years of precedent. The petitioners have offered no reason to reverse this Court's longstanding rule.

V. THE PETITIONERS' ARGUMENT THAT THE COURT OF APPEALS FAILED TO ADDRESS ONE OF THEIR ARGUMENTS SHOULD HAVE BEEN PRESENTED TO THE COURT OF APPEALS

The court of appeals noted in footnote 1 of its opinion that the petitioners did not challenge the district court's order setting aside the $80,000 constructive fraud verdict. Buried at page 33 of the petitioners' brief to the court of appeals, however, was an argument that this order was erroneous. This argument was not identified in the petitioners' statement in their brief at page 9 of questions presented for review, as required by FED. R. APP. P. 28(a)(2). Moreover, the argument was included in the portion of the petitioners' brief which addressed

the separate claim for breach of fiduciary duty. It is not surprising, under these circumstances, that the court of appeals overlooked the argument.

When the court mistakenly concluded that the petitioners had not challenged this particular ruling, however, FED. R. APP. P. 40(a) authorized the filing of a petition for rehearing which "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked. . . ." This rule was adopted specifically to permit litigants to bring to the attention of the court of appeals issues which the court missed. The petitioners sought rehearing before the court of appeals but for some reason did not mention this issue in their petition. They failed to avail themselves of the remedy provided by the rules. This Court should not grant the writ solely to relieve the petitioners of the consequences of their procedural lapse.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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